

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
 YAVAPAI COUNTY, ARIZONA
 FOR THE COUNTY OF YAVAPAI

2011 DEC 29 AM 8:28

SANDRA K HARKHAM, CLERK

By *Stephanie Kling*

STATE OF ARIZONA,)

Plaintiff,)

vs.)

Case No. V1300CR201080049

JAMES ARTHUR RAY,)

Defendant.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY TWENTY-EIGHT

APRIL 6, 2011

Camp Verde, Arizona

ORIGINAL

REPORTED BY
 MINA G. HUNT
 AZ CR NO. 50619
 CA CSR NO. 8335

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1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

2 FOR THE COUNTY OF YAVAPAI

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4 STATE OF ARIZONA,)

5 Plaintiff,)

6 vs) Case No V1300CR201080049

7 JAMES ARTHUR RAY,)

8 Defendant)

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1 Proceedings had before the Honorable

2 WARREN R. DARROW, Judge, taken on Wednesday,

3 April 6, 2011, at Yavapai County Superior Court,

4 Division Pro Tem B, 2840 North Commonwealth Drive,

5 Camp Verde, Arizona, before Mina G. Hunt, Certified

6 Reporter within and for the State of Arizona.

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PROCEEDINGS

THE COURT: We're on the record in State versus James Arthur Ray, who is present with his attorneys, Mr. Li, Mr. Kelly and Ms. Do. The state is represented by Ms. Polk and Mr. Hughes.

The attorneys have requested time to discuss legal issues. And I appreciate you emailed me with a very brief summary of what would be discussed.

I guess, Mr. Li.

MR. LI: Yes, Your Honor. There is, essentially, two issues that's outlined in the email. One is the issue about whether or not the state's avowal that the sweat lodges were, essentially, the same structure is correct or borne out by the facts, and the other relates to the Court's prior 404(b) ruling.

With respect to the first issue, I think it's important to note that a sweat lodge is, essentially, made of only a few components. One is the frame. The other is the coverings. Other components would be rocks and then the wood used to heat the rocks. That's essentially the entire universe of, quote, unquote, materials used in the sweat lodge ceremony.

Now, we talked to Mr. Mercer yesterday to explore the foundation -- any foundation that he might have if he were proffered by the state to be able to testify that, in fact, the sweat lodge used in October '09 is the same sweat lodge that was used in May '09, which is the subject of, I think, Ms. Foster's testimony.

THE COURT: Perhaps. She was not clear on the date.

MR. LI: It could have also been earlier. But even if it were only the May sweat lodge, what we -- what we explored with Mr. Mercer is what's the basis for his foundation -- you know -- his -- any claim that he would know that these are the same -- this is the same material. And what we found out is that, in fact, it isn't.

Not only are many of the materials entirely different, but he cannot say and would be guessing if -- he cannot say that even the tarps were the same. And he would say that he was guessing if he got up there and said that the tarps were the same.

And the reason is he says that all the tarps look the same. They're all just blue tarps, and there's no way to tell them apart. He did say

there were a few blankets -- some of them moving blankets -- where he could tell the difference between them because maybe they were sewn together.

But there were many moving blankets that were just simply moving blankets. And he cannot tell whether one moving blanket is the same as a prior moving blanket. They're not numbered. There's no inventory. All those sorts of issues impact his ability to -- you know -- establish that these are, in fact, even the same coverings.

And the pertinent fact is this:

Mr. Hamilton hired Ted Mercer to work for Angel Valley in 2008. At the end of 2008, they separated ways. And, essentially, Mr. Mercer through all of 2009 was not an employee of Angel Valley. He worked exactly two days for Angel Valley. One day is when he put up a sweat lodge in May of 2009 and another day when he put up the sweat lodge in October 2009.

And, Your Honor, we prepared a transcript -- and I know I had sent it back earlier. We have provided a copy to the state. This is a transcript of our interview with Mr. Mercer yesterday. I would like to provide it to the Court.

THE COURT: That's not what I had requested. I had asked for some medical records.

MR. LI: I understand.

THE COURT: Okay.

MR. LI: In terms of -- in terms of the proffer that I'm making here, I would like -- I provided a copy to the state. It's the state's recording that we had transcribed last night.

If I may approach?

THE COURT: Okay. You may. Has that been marked?

MR. LI: It has not.

THE COURT: Then it needs to be marked. There needs to be a very special record on this. I don't want there to be any confusion. If it gets marked, it doesn't mean it's an exhibit in the case. It needs to be kept separate. There was one other time when it came up with possible confusion. I think it was in the 609 context of having things come in. And I don't want nonexhibits going to the jury.

MR. LI: Sure.

THE COURT: So I'd like that marked.

Ms. Polk, I want to see that just for purposes of this discussion.

1 MS. POLK: Yes, Your Honor.

2 THE COURT: Okay.

3 MR. LI: Should I hand it to the Court first?

4 THE COURT: To the clerk. Please.

5 MR. LI: And so the remaining 270 some-odd
6 days, Mr. Mercer was not on the property, was
7 not -- had no employee responsibilities at the
8 property in 2009. So, essentially, he worked two
9 days. The remaining 270 days he had nothing to do
10 with Angel Valley. So he has no idea and no
11 foundation to speak of what sort of maintenance is
12 going on, what's happening in the pump house, what
13 they're even doing at Angel Valley, what they're
14 doing with the tarps, what they're doing with the
15 wood, what they're doing with any of the lands, any
16 of those things.

17 I just want to make a few specific
18 points, Your Honor, relating to the various
19 components. With respect to the wood, it is -- it
20 is by definition not the same wood. Because -- and
21 this should be obvious. But when you burn the
22 wood, it turns to ash. And so, obviously, there's
23 no way it can be, in fact, the exact same wood.
24 That's a fact that Mr. Mercer agreed with.

25 It is also not even the same type of

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1 wood. While in prior sweat lodges, at least in one
2 prior sweat lodge, some construction wood was used.
3 In the October 2009 sweat lodge, almost all of it
4 was construction wood. And that's what Mr. Mercer
5 said in two different interviews with the Yavapai
6 County Sheriff and yesterday.

7 So, one, it is absolutely, in fact, not
8 the same wood. Because obviously when you burn
9 wood, it turns to ash; you cannot burn it again.
10 And the second point is that it's not even the same
11 types of wood.

12 With respect to the rocks, Mr. Mercer
13 explicitly said that these are not the same rocks.
14 It's not even that -- they always use different
15 rocks. Now, they may be the same type of rock;
16 that is, lava rock obtained from the creek. But
17 they are not the same rocks. And he cannot say
18 that he knows whether anything happened to the
19 rocks, whether they were treated with anything,
20 whether any sort of additive was put on the rock by
21 accident, on purpose, anything. He has no idea.
22 But they are not, in fact, the same rocks,
23 explicitly.

24 With respect to the tarps, I already
25 addressed that. Essentially, what he can say is --

1 Your Honor, there's a big brown -- you know --

2 rubber tarp gasket that Mr. Hamilton made for the
3 sweat lodge. That he can say is the same. Okay?
4 And in the pictures, the Court has probably seen
5 it. It's a big -- it's the main covering.

6 Inside that covering are blankets,
7 sleeping bags and moving blankets and -- you
8 know -- those blue sort of utility tarps. He
9 cannot say that any of the utility tarps are the
10 same. He has no idea because they all look the
11 same.

12 In fact, he has said that these tarps are
13 all over Angel Valley -- found all over Angel
14 Valley, used for all different purposes. He has no
15 idea whether the tarps that are in the pump house
16 are the same tarps that he looked at earlier. In
17 fact, when he went in there, he seen new bags of
18 tarps, brand-new tarps in there. So he has no idea
19 whether people are putting things in there, taking
20 them out, using them for other reasons. He has no
21 idea.

22 With respect to the blankets, there are a
23 few blankets he can tell are the same because
24 perhaps they've been sewn together or are in some
25 distinctive manner identifiable. But the rest of

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1 them he has no clue. He says a moving blanket
2 looks like a moving blanket. And so he doesn't
3 know whether they're the same blankets or they're
4 different blankets.

5 Another point with relation to these
6 tarps, he has no idea for the 270 some-odd days
7 when he's not on property, whether any of these
8 tarps, blankets, whatever have been taken out of
9 the pump house and used for any other purpose,
10 because he can't -- he has no foundation, no
11 personal knowledge relating to that.

12 On top of that, he says that the tarps
13 are not assembled in any particular order. There's
14 no -- you know -- it's not like they're numbered
15 and that each tarp goes in its -- you know --
16 prescribed place, that they're just put on there in
17 a random pattern.

18 So he can't say that they're the same
19 tarps. He can't say that they were maintained in
20 exactly the same way. He can't describe in any way
21 how they were maintained. He can't even say that
22 they stayed in the pump house for 270 some-odd
23 days. And he can't say that they were assembled --
24 in fact, he can say that they were not assembled in
25 the -- in the same manner.

1 With respect to the rat poison that he
2 identified in October -- on October 9 to
3 Detective Diskin, he says he doesn't know how it
4 got there. He says he saw it on the floor, chunks
5 of it. And he has no personal knowledge how they
6 got -- how the rat poison got in there.

7 He also said that he has no personal
8 knowledge as to whether anybody put rat poison in
9 the tarps themselves. So he cannot -- you know --
10 identify when the rat poison was put there, if any
11 additional rat poison was put there. He has no
12 idea, other than the two days he was in the pump
13 house, what happened on the other 270 days.

14 Same thing with the prospective
15 insecticide. He doesn't know whether for those 270
16 some-odd days anybody treated any of those tarps
17 with insecticides. He has no personal knowledge to
18 any of that, so he cannot say that these tarps,
19 even the ones that are the same that he can
20 identify, are in the same condition each time he's
21 looked at them. He simply cannot say that.

22 With respect to the land under which
23 the -- you know -- the frame -- on top of which the
24 frame sets and the coverings are placed, he's not
25 the landscaper. He was on the property a couple of

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1 days; doesn't know what happened on the other 270
2 days; doesn't know if the land was treated in any
3 particular way; doesn't know whether there was any
4 herbicide, pesticide, anything like that used.

5 He will say that he believes that the
6 Hamiltons had a policy against using pesticides.
7 Okay? He will say that. That's a belief. But he
8 also would admit that he has no idea whether, A,
9 somebody else just put pesticides not knowing of
10 the policy; or, B, whether the Hamiltons themselves
11 followed their policy.

12 And I would -- I would submit, Your
13 Honor, that Fawn Foster's testimony relating to
14 both rat poison and ant poison suggests that
15 whatever policy the Hamiltons had was perhaps
16 observed in the breach. Because clearly those
17 things -- rat poison and ant poison -- would, I
18 think, qualify as pesticides and chemicals that
19 would -- you know -- purported to be in violation
20 of this purported policy.

21 The bottom line with respect to
22 Mr. Mercer is he cannot establish foundation at all
23 that the sweat lodges in October 2009 or any prior
24 sweat lodge, but in particular May 2009, but even
25 any prior sweat lodge before that, is the same

1 sweat lodge with the same materials stored in the
2 same manner.

3 He has no ability to testify about the
4 hundreds and hundreds of days between when he
5 actually touched the various material. He doesn't
6 know how any of these things were treated. He has
7 a belief, but he does not know. And he admitted it
8 in the transcript that I've provided to the Court.

9 So with that -- with that, that's the
10 first issue which has to do with whether or not
11 Mr. Mercer should be permitted to testify without
12 any foundation about whether or not he knows that
13 the sweat lodge in October 2009 is the same as the
14 sweat lodge in May 2009 or any prior sweat lodge.

15 And we'd submit to the Court, Your Honor,
16 that there is literally no foundation for any of
17 that. He literally doesn't know anything other
18 than some of the tarps are the same.

19 THE COURT: Ms. Polk.

20 MS. POLK: Thank you, Your Honor.

21 First of all, the issues that Mr. Li is
22 addressing goes to the weight of the evidence, not
23 the admissibility. And I would also submit that
24 his recitation of what Mr. Mercer's testimony will
25 be is somewhat exaggerated. And his last statement

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1 that Mr. Mercer literally can lay no foundation is
2 simply not true.

3 But what he's attacking -- what Mr. Li is
4 attacking goes to the weight of the information,
5 not the admissibility. The issue is whether or not
6 information concerning what happened in prior years
7 at Angel Valley in other sweat lodges or in
8 identical or similar sweat lodges is relevant.

9 And I would point, first of all, to
10 Rule 401, that defines "relevant evidence" as any
11 evidence having any tendency to make the existence
12 of any fact that is of consequence to the
13 determination of the action more probable or less
14 probable than it would be without the evidence.

15 There's no requirement that these sweat
16 lodge materials -- the rocks, the water, the
17 fire -- there's no requirement that everything be
18 identical in order to make this topic relevant.
19 And the reason this topic is relevant is because
20 the defense has challenged causation.

21 They are challenging that it is heat that
22 killed the three victims. They are suggesting that
23 it's something other than heat, such as chemicals
24 on the property in the form of insecticides,
25 something sprayed here or there or perhaps in the

1 tarps themselves. So the defendant is charging
2 causation.

3 Relevant to causation, then, is this
4 information that relates to sweat lodges run at
5 Angel Valley in the preceding years. And there's
6 actually three patterns that are relevant. The
7 first is that if it's the defendant running the
8 sweat lodge, then people get sick. It doesn't
9 matter what the kiva is made of. It doesn't matter
10 what the coverings were made of. What matters --
11 the common denominator is if it's the defendant
12 running the sweat lodge, then people get sick.

13 During that time frame from 2005
14 through 2009, there are many other sweat lodges
15 that are conducted on the property of Angel Valley.
16 And testimony will be that people don't get sick.

17 So the first pattern is regardless of the
18 kiva, regardless of the tops and the coverings and
19 the wood and the water and the rocks, if the
20 defendant runs it, then people get sick. That's
21 what's identical.

22 The second pattern is that from May
23 of 2008 forward -- actually, I think it's August
24 of 2008 forward, when the kiva was built that was
25 used in 2008, the latter part of 2008 and 2009,

1 that the ceremonies that are conducted in that kiva
2 and coverings, which are, essentially, the same,
3 the pattern again is that if it's the defendant
4 running the sweat lodge, people get sick. And if
5 it's somebody else running it, people don't get
6 sick.

7 So the first pattern is it doesn't matter
8 what the kiva is made of or what the covering is
9 made of. The common denominator is the defendant.

10 The second pattern is when it's,
11 essentially, the same covering, it is the same
12 kiva, the common denominator again is the
13 defendant. If he's running it, people get sick.
14 If other people are facilitating the sweat lodge,
15 people don't get sick.

16 And then the third pattern is this
17 pattern of the defendant and heat. And what the
18 testimony will be through various witnesses is that
19 in '03 and '04 the sweat lodge was not hot enough
20 for the defendant and he asked for more and more
21 heat.

22 In '05 the Hamiltons created this large
23 rubber membrane that goes over the sweat lodge.
24 They added that, and then that's the year that
25 people got sick, including Daniel Pfankuch. And

1 I'll talk about his records in a moment.

2 After the '05 incident the testimony at
3 the 404(b) hearing through Amayra Hamilton was that
4 9-1-1 was called. An ambulance came. She
5 confronted Mr. Ray. She told them this will never
6 happen again on my property. He apologized. And
7 then in '04 he ratchets down the heat -- I'm sorry.
8 In '06. And then by '07 the testimony at the
9 404(b) hearing was he wanted it hotter again. And
10 so '07 people get sick.

11 And then by 2008, that's when the new
12 kiva was built and the same coverings are put on
13 the structure. '07 people get sick. '08 people
14 get even sicker. And then in 2009 three people
15 die.

16 There's three different patterns that are
17 relevant to this issue of causation. The common
18 denominator through all those patterns, the thing
19 that's identical, is the defendant. It's not
20 relevant to two of those three patterns what the
21 kiva was made of or what the structure was. The
22 information is relevant because it goes to this
23 issue of causation.

24 It's through the three patterns that
25 there is information that leads the jury to

1 conclude that it's the heat that kills and not some
2 other substance on the property, some other
3 pesticide.

4 Your Honor, the -- I just want to discuss
5 the interview with Ted Mercer yesterday. The state
6 was given a transcript this morning. And I was
7 there for the interview with Mr. Mercer. And on
8 page 8, lines 13 through 28, Mr. Li says to
9 Mr. Mercer, okay. And you have no idea whether
10 these coverings, other than the big sort of round
11 one, are exactly the same as all the other sweat
12 lodge ceremonies?

13 And Mr. Mercer says, oh. Sure they're
14 the same.

15 And Mr. Li says, but you don't know that
16 because they're not numbered, are they?

17 Mr. Mercer says: Well, I know that
18 because I'm the one that put them away and I'm the
19 one that went and got them. So I -- in between the
20 time no one else would go in there. I mean, every
21 once in a while there might be new ones that would
22 show up in the package.

23 And then on page 11, when Mr. Li is then
24 doing what he can rightly do in front of the jury,
25 which is attempt to impeach or pick away at the

1 weight of the evidence, Mr. Li says, the only
2 person who would know would be Michael Hamilton?
3 And Mr. Mercer agrees with that.

4 And then if I can direct the Court's
5 attention to Exhibit 661, which is the transcript
6 of the interview of Michael and Amayra Hamilton on
7 October 26 of 2009 by the detective. On page 5,
8 lines 23 through 28, Detective Poling says, so
9 the 2009 lodge is different than the 2008?

10 And Mr. Hamilton says, 2008 and 2009 were
11 exactly the same materials, exactly the same
12 physical structure.

13 And then if I can direct the Court to the
14 testimony of Amayra Hamilton at the 404(b) hearing
15 where that same issue is addressed. And it's
16 page 15. And that's where the pattern -- I think
17 the Court will recall where Mrs. Hamilton testified
18 to the pattern of the defendant wanting more heat
19 over the years, and when the heat was increased,
20 people got sick. After 2005, the heat was
21 decreased. People didn't get sick for a couple of
22 years. And then at Mr. Ray's request, the heat was
23 increased again.

24 And then on -- and then at page 36
25 there's a discussion of what materials are used to

1 build the kiva and the coverings and then how they
2 are stored.

3 Again, Your Honor, this information goes
4 to the weight, not the admissibility. And the
5 admissibility is clear. It is clear that the
6 defendant has raised the issue of causation. It is
7 clear that he is claiming that it's not the heat
8 that killed the three victims, that it's something
9 else on the property. And most relevant, very
10 relevant, to whether or not it's the heat or
11 something else are those three patterns that I have
12 identified that show that it's the pattern of heat
13 with the common denominator being Mr. Ray.

14 What the testimony through Mr. Mercer
15 will be is that in 2008 a new kiva was built. He
16 personally builds it. He will testify that in his
17 experience at Angel Valley from 2007 through 2009,
18 it's all the same blankets and it's all the same
19 tarps, although new tarps might be added. And it's
20 that same membrane that goes over the top.

21 Mr. Mercer will talk about how the
22 coverings are stored in the pump house. That's
23 where he gets them from. That's where he puts them
24 back. And then Mr. Hamilton will testify that it's
25 exactly the same coverings.

1 There is no requirement, Your Honor, that
2 the state show that exactly the same materials are
3 used to build the coverings or that it's exactly
4 the same wood or the same water. That just goes to
5 the weight.

6 Mr. Mercer will testify about heat, how
7 he constructs the sweat lodge every time he puts
8 the coverings on the kiva and that there is a
9 general order. He will testify that the blankets
10 and the sleeping bags, that multiple layers of
11 those go first. Then there's a layer of tarps,
12 that no tarps are on the inside, and that over the
13 top goes the membrane.

14 So, essentially, there's a pattern. But
15 there's no requirement that the blankets be
16 numbered, that they go in any certain order. He'll
17 talk about the general order. And then through
18 Detective Diskin, they took a sample of the
19 material and left it in place. And so the jury
20 will be able to see the layers of blankets, the
21 layer of tarp, and then the membrane over the top.

22 Your Honor, the state submits that this
23 information is clearly relevant to causation.

24 And then with respect to the 2005
25 incident and the medical records of Daniel

1 Pfankuch, who is the patient who was taken to the
2 hospital in 2005, the -- his admitting diagnosis
3 was syncope, which is fainting. The notes indicate
4 syncope, and the word "heat," and it looks like
5 "exposure"; although that might -- we'll leave it
6 to the doctor to interpret that for us. The
7 patient was discharged with instructions for heat
8 exhaustion.

9 And then the information that was noted
10 on his intake is that he was aggressive, that he
11 had a rapid -- a racing pulse, that his eyes were
12 rolled back in the back of his head, and that he
13 was unresponsive.

14 Those, of course, are all very similar --
15 those are all symptoms of heat stroke. We've had
16 that testimony through the doctors now and
17 opposing -- those are very similar to what we've
18 heard happened in 2009 with respect to Stephen Ray
19 and to many of our other participants as well.
20 And, Your Honor, part of that was the ambulance
21 report that I was looking at.

22 But, finally, Your Honor, the state
23 submits that the information that goes to causation
24 is relevant. And a proper foundation will be laid
25 through Mr. Mercer today, and then it will be

1 bolstered through the testimony of the Hamiltons
2 later this week.

3 THE COURT: Mr. Li, did you have anything
4 else?

5 MR. LI: Yes, Your Honor. You know, this is a
6 critical moment in the trial, because this -- this
7 is sort of the intersection of a lot of the legal
8 issues we've been fighting over for the last six
9 months or so. And I had not addressed the 404(b)
10 issue because I thought we were only going to focus
11 on -- on whether or not Mr. Mercer had any
12 foundation.

13 THE COURT: I think it's very closely related.

14 MR. LI: Yes. And I had not -- I had not
15 discussed that yet because I think as -- the first
16 issue, we have to discuss Mr. Mercer's foundation
17 or lack thereof.

18 Ms. Polk is incorrect. The evidence code
19 does not say you can admit information for which a
20 witness lacks personal knowledge. That's Rule 602.
21 And I'll just read it.

22 A witness may not testify to a matter
23 unless the evidence --

24 THE COURT: I know the Rule.

25 MR. LI: Okay.

1 THE COURT: I mentioned it.

2 MR. LI: And so it's not a question of weight.
3 It's a question of admissibility.

4 Essentially, this witness doesn't know --
5 you know -- how these materials were stored,
6 whether they're even the same materials. He
7 doesn't know -- he knows for a fact they're not the
8 same rocks. He knows for a fact they're not the
9 same -- not the same wood.

10 You know. And the -- and the thing that
11 is very disturbing for counsel here is that when
12 the state -- you know -- selectively reads from the
13 transcript this portion where Mr. Mercer said,
14 yeah. I did know because I'm the one that put them
15 away, well -- you know -- what happens next is we
16 sit down and we say, well, Mr. Mercer. Let's talk
17 about your foundation for that.

18 And it -- you know -- I've highlighted
19 page 9, which the Court -- I mean, which the state
20 decided not to read. And it says -- I mean, I'm
21 not going to read it to you. But it's all there,
22 Your Honor. It says, so -- you know -- you know --
23 So even though you're saying that because you're
24 the one who puts the tarps on and off, there could
25 have been someone that came in here and took some

1 out and brought some other ones in. So you don't
2 know, for instance, whether or not every single
3 tarp was exactly the same tarp because you don't
4 have an inventory with the tarps?

5 That's correct.

6 I mean, they're just tarps?

7 Yes.

8 So the point is that this -- this is a
9 pattern that we see where the state will ask some
10 witness, do you know whether -- some fact. You
11 know, some inflammatory fact. The witness will say
12 Yes. And then instead of asking the next question,
13 which is a proper question -- how do you know? Or
14 did you personally observe this? Or any of the
15 sort of basic foundational questions, they just run
16 right into it.

17 And the problem with this, this exact
18 issue with Mr. Mercer, he, in fact, does not have
19 foundation. If the Court reads the transcript, the
20 Court will see that over and over again, Mr. Mercer
21 says things like I would be guessing. I was not on
22 the property for 200 some-odd days. I have no idea
23 what was going on in the pump house. I have no
24 idea.

25 He doesn't know what's actually in there.

1 So the basic foundational point that the sweat
2 lodges are the same is -- fails. And it's not a
3 weight issue. It's an admissibility issue.
4 Because he simply has no personal knowledge. And
5 under 602 it would be precluded.

6 With respect to the 404(b) issue, now it
7 just becomes this argument the state has made that
8 it's a pattern. I wrote it down. That the
9 defendant runs sweat lodges in the same way, and
10 they get sick. So it's a pattern.

11 That is exactly propensity evidence.
12 Assuming for a second we even knew what the state's
13 theory of action is, what actually happened -- you
14 know. What is it that Mr. Ray did that is a crime
15 in 2009? Assuming that they ever have stated that
16 properly, which we would submit they haven't. But
17 assume for a second that they did. What they are
18 saying is that he did things in 2005, 2006, 2007,
19 2008, and the same thing happened in 2009. And,
20 therefore, because he did prior acts that were
21 consistent and in conformity therewith in 2009, the
22 jury should be able to conclude that based on the
23 purported facts, Mr. Ray -- you know -- is guilty
24 of manslaughter in 2009. That's exactly what Rule
25 404(b) prohibits.

1 It has some narrow exceptions, which the
2 Court has already ruled on, relating to knowledge,
3 motive, intent, all of those sorts of things.
4 Propensity, i.e., pattern evidence, is explicitly
5 disallowed by Rule 404(b). It's explicitly
6 disallowed.

7 And so what the state is, essentially,
8 inviting the Court to do is inviting error. The
9 state is, essentially, saying never mind Rule 602,
10 which deals with lack of personal knowledge and the
11 inadmissibility of information for which a witness
12 has no personal knowledge. Never mind that. Never
13 mind the Court's very carefully worded ruling in
14 February relating to the 404(b) hearing that we had
15 where we had three days of witnesses, including all
16 of the same witnesses that the state now wants to
17 reintroduce for exactly the same purpose.

18 The Court heard each of those witnesses
19 that the state is now saying, well, these are the
20 witnesses that are going to show the pattern. The
21 Court spent three days with these witnesses, and
22 the Court ruled --

23 THE COURT: I've got my ruling open right
24 here.

25 MR. LI: Okay. I just think --

1 THE COURT: I mean, the actual court ruling
2 that I actually ordered?

3 MR. LI: Yeah. I'm not going to read it.

4 THE COURT: It's important, though. I
5 certainly want to bring that up because it's really
6 quite focused.

7 But go ahead. Please say what you want
8 to say, Mr. LI.

9 MR. LI: Well, I mean, it just says right
10 here, the Court has concluded, on page 3, that the
11 evidence presented in this -- this is stated in
12 different ways. This is a very full paragraph.

13 THE COURT: Again if you're going to read,
14 please at a pace.

15 MR. LI: I apologize.

16 The Court has concluded that the evidence
17 presented in this 404(b) proceeding does not
18 establish that the harm manifested by the signs and
19 symptoms associated with some pre-2009 sweat lodge
20 participants was similar for purposes of 404(b)
21 analysis to the life-threatening and fatal
22 conditions suffered by some participants in 2009.

23 Assuming that the defendant was aware of
24 the various signs and symptoms associated with
25 pre-2009 participants -- which I think the Court

1 also ruled there was no evidence of that -- this
2 knowledge would not constitute notice that he
3 allegedly was subjecting these participants to a
4 substantial and unjustifiable risk of death.

5 As noted above, despite the large number
6 of participants, there is no substantial medical
7 evidence that any of the persons attending the
8 pre-2009 Spiritual Warrior events suffered a
9 life-threatening condition. Therefore, with regard
10 to the manslaughter charges, evidence of the
11 similarity of the way in which the sweat lodge and
12 other ceremonies were conducted from year to year
13 is not relevant and admissible on the issues of
14 knowledge, i.e., conscious disregard to the known
15 risk and absence of mistake or accident.

16 So that's -- that's the Court's ruling on
17 exactly the topic that the state is now trying to
18 relitigate, this exact same issue that we spent
19 days arguing in court, briefing, where the Court
20 wrote a very detailed and well-reasoned opinion.

21 And now we're going to just, based on a
22 complete lack of foundation, open the door --
23 according to the state, we're going to open the
24 door and reverse the ruling that the Court made in
25 February 2011.

1 And the problem with that, Your Honor, is
2 that it's not proper. The problem with that is
3 that we have designed our entire case and have
4 spent, what, eight weeks in trial right now with
5 this ruling as something that we understood to be
6 some of the ground rules.

7 The state has continually tried to erode
8 the ruling any way they can. And the latest one is
9 causation. And so they say, well, look. All these
10 sweat lodges are the same every single time. And
11 that the only difference between the instances
12 where somebody gets sick and instances where
13 nothing happens is Mr. Ray. And so because the
14 sweat lodges are the same, we can throw out the
15 idea that there's some environmental problem or
16 there might have been some environmental problem in
17 October 2009 because the sweat lodges are the same.
18 And it's all Mr. Ray's fault because there's this
19 pattern.

20 That's their argument now. And that's
21 sort of now become a causation argument. Okay?

22 The problem with that entire theory is
23 that it lacks any foundation and is completely
24 inadmissible under Rule 602. Mr. Mercer does not
25 know. He says -- you can read the transcript. He

1 says, I'd be guessing. Because, of course, he
2 doesn't know.

3 He's not -- he's not the guy. There's no
4 bar code on any of this stuff, and he's not the guy
5 who's in charge of the pump house. He's there two
6 days in the entire year of 2009. He doesn't work
7 there. He has no idea what's going on.

8 And so Ms. Polk's argument that now,
9 well, that -- we don't have to worry about that.
10 He can just get up there and say whatever he wants
11 and it's really for the jury to decide whether --
12 you know -- the weight of the evidence as opposed
13 to the admissibility -- that's not how it works.

14 First, this witness has to have some
15 foundation. He's, essentially, just offering an
16 opinion. He doesn't have personal knowledge. He's
17 not an expert. And under 602 all of that should be
18 stricken.

19 As a consequence, the consequence, the
20 only argument remaining to the state is that, well,
21 Mr. Ray ran a sweat lodge in ways that the state
22 contends were dangerous and produced these -- what
23 the state contends were life-threatening
24 conditions.

25 But what the Court has heard in our

1 hearings and seen pictures, Your Honor -- and I'm
2 sorry to be so long-winded.

3 THE COURT: No. That's okay.

4 MR. LI: But this is -- this is obviously a
5 critical moment in the case.

6 The state saw witness after witness after
7 witness under oath here at the 404(b) hearing. The
8 state saw the very same witnesses we're talking
9 about here right now -- Ted Mercer and Debbie
10 Mercer -- talk about how they saw 20 people in
11 life-threatening conditions after the 2008 sweat
12 lodges. And then the Court saw those pictures that
13 we showed one after another of people like this and
14 people smiling, people identified by the witnesses
15 as having been in a life-threatening condition in
16 one picture, and then in the very next picture
17 they're lying -- leaning up with a big thumbs up
18 and a big grin on their face.

19 And the point the Court saw and upon
20 which the Court based its ruling was that that's
21 just not -- that's improper lay opinion that is,
22 frankly, wrong.

23 And as the Court said, it would be
24 misleading to the jury, deeply misleading to the
25 jury, to suggest that based on that flimsy type of

1 evidence, that life-threatening conditions occurred
2 in 2005, 2006, 2007, 2008. It simply didn't
3 happen. And the Court ruled that way in that
4 paragraph that I read.

5 So to now allow I think -- six months or
6 so after we have this hearing, after we saw all
7 those photographs, to allow -- you know -- two
8 months after the Court made a very well-reasoned
9 ruling about exactly these issues, to now just
10 allow the state to willy-nilly bring in new
11 information or new arguments and then bring in
12 old -- the prior sweat lodge, contrary to the
13 Court's opinion, when we have relied on this, when
14 we have gone through this entire trial, given our
15 opening statements, directed our various
16 cross-examinations, all of those things; on that
17 basis it would be wrong, and it would be unfair,
18 Your Honor, and contrary to the law.

19 THE COURT: Were there other legal issues you
20 were going to raise?

21 Ms. Polk, you mentioned something about
22 the Hamiltons' testimony?

23 MS. POLK: Your honor, I have a few
24 miscellaneous with respect to the Hamiltons'
25 testimony. Do you want me to raise them right now?

1 THE COURT: Yes.

2 MS. POLK: Just a few things, Your Honor.

3 First of all, the Court had referenced a
4 couple of days ago the issue of bankruptcy. And I
5 believe I heard the Court saying that there would
6 be no information concerning the Hamiltons'
7 bankruptcy in the trial?

8 THE COURT: I just -- the only thing I wanted
9 to do is make sure in order -- 2.9 requires if I
10 hear something factual, I need to let --
11 inadvertently, I need to let the parties know. I
12 have no idea about any reliability, if that has any
13 accuracy to it whatsoever. And that's all I said.
14 I just mentioned it because someone unsolicited
15 mentioned something to that effect to me, and I
16 wanted the parties to know.

17 MS. POLK: And I don't know from the defense
18 whether or not they intend to raise that. I guess
19 I would wait to hear from them whether or not they
20 believe that the bankruptcy is relevant.

21 THE COURT: So is that a fact, then?

22 MS. POLK: Yes.

23 THE COURT: Okay.

24 MS. POLK: I believe that they are. I
25 actually believe that they are. I don't know too

1 much about it.

2 THE COURT: Okay.

3 Mr. Kelly.

4 MR. KELLY: Judge, if I may address that. I
5 believe I'm going to conduct the questioning of
6 Mr. Hamilton. And I was going to raise that issue,
7 Judge. I believe it relates to his motive and
8 bias -- potential motive and bias. That's why he's
9 trying to save his failing company.

10 THE COURT: Okay. When would it be
11 anticipated that the Hamiltons would testify?
12 Possibly today?

13 MS. POLK: No. It will be the Mercers first
14 and then the Hamiltons later in the week.

15 THE COURT: Then rather than have full
16 argument, can we do what we're doing now so I can
17 at least be tuned in to what might come up?
18 Because I really want to get going with things
19 today. But what other issues just so I'll know and
20 can look ahead a bit?

21 MS. POLK: There is a memorandum. It was an
22 email that we received from Mrs. Hamilton. We
23 disclosed everything we received to the defense.
24 In it she stated her belief that there was a
25 romantic relationship going on between Kirby Brown

1 and James Shore.

2 There is no evidence to support that. We
3 do not believe it to be true at all. The two had
4 not even met before the Spiritual Warrior week.
5 But that was another area that it would be unfair
6 and prejudicial for the defense to raise it. There
7 is no good basis to raise it.

8 THE COURT: Okay.

9 MS. POLK: In one of the interviews there is a
10 question posed that -- about whether or not Michael
11 Hamilton has a reputation for being violent or for
12 not treating employees well. Again, there is no
13 information to substantiate that. That would be
14 character evidence that would be inadmissible.
15 But, again, those are the types of questions
16 through cross-examination where the damage is done
17 in the question.

18 And so the state would ask that the
19 defense not be allowed to even pose a question
20 along those lines.

21 THE COURT: Okay.

22 MS. POLK: And the final area is the area of
23 the lawsuits. I believe it's 10 plaintiffs had
24 filed claims against the defendant and lawsuits
25 against the Hamiltons. That's still pending. I

1 believe that, consistent with the Court's prior
2 rulings, that it is admissible on the issue of bias
3 of a witness. But to inquire any further about
4 specific allegations made in this lawsuit, again,
5 we are looking at statements made by plaintiffs.

6 And for the defense to start reading
7 through the lawsuit and suggesting that specific
8 allegations are true is going beyond the rule that
9 allows the lawsuit to be used to question motive or
10 bias of a witness.

11 And so I would ask that the
12 information -- the fact that there's a lawsuit, I
13 believe that that is relevant but that it would not
14 be appropriate to start reading from the complaint
15 itself, as has been the practice for past
16 witnesses.

17 Additionally, there was a lawsuit filed
18 against the Hamiltons and/or Angel Valley by Native
19 Americans. That has been dismissed. And I do not
20 believe that that should be raised at all in this
21 case.

22 And then, finally, there is a lawsuit
23 between the Hamiltons -- filed by the Hamiltons and
24 Angel Valley against Mr. Ray, which is still
25 pending.

1 THE COURT: Mr. Kelly, all I need to know at
2 this point, do you oppose all the positions of the
3 state on these various issues? Is there anything
4 that you agree on?

5 MR. KELLY: I would agree, Judge, with an
6 explanation as to the relationship, if any, between
7 Kirby and James -- or between Ms. Brown and
8 Mr. Shore. We were not intending on bringing that
9 up. But I do want to point out to the Court that
10 there are witnesses, I believe, who testified they
11 were holding hands and kind of an implication that
12 one was staying in to protect or help the other.
13 But we don't intend to explore a relationship, if
14 any. It's simply -- I can't see any relevance.

15 In regards to these other areas, Judge, I
16 would simply state that if we have a good-faith
17 basis to ask a question relating to motive or bias
18 of a witness, we intend to ask that question. And
19 that would include representations made in
20 lawsuits, whether as a plaintiff or a defendant.
21 And I believe it is -- we've been through this.
22 But we would always, of course, Judge, have a
23 good-faith basis. If asked to prove it up, we'll
24 prove it up.

25 THE COURT: Okay.

1 MR. LI: Your Honor, if I may, just one quick
2 point. As my colleague showed me the transcript of
3 the arguments from November of this year when we
4 were talking about exactly this issue relating
5 to -- you know -- propensity evidence, and
6 Ms. Polk, essentially, makes the exact same
7 argument relating to why these prior sweat lodges
8 are admissible, as she just has made today. Which
9 is, essentially -- you know -- what makes this
10 tragic -- what separates what happened in 2009,
11 what distinguishes it from a tragic accident and
12 makes it a crime? The answer is the state of
13 recklessness.

14 Having gone through the lodges -- sweat
15 lodges in 2005, 2007, 2008, having had -- being
16 made aware of what happens to people when you
17 expose them to extreme heat, aware of that risk,
18 and chooses to consciously disregard and then
19 conduct a sweat lodge in 2009 that is even hotter,
20 more intense, puts more pressure on the
21 participants to stay inside, that's what makes it a
22 crime. That's what shows he acted recklessly.

23 So the point is, it's the same song, just
24 a different day. And we've litigated this issue
25 extensively. We had a long -- a lot of argument

1 about this. And the Court made a very well-founded
2 ruling, and we'd urge the Court to stick to that
3 ruling.

4 THE COURT: Part of the ruling was based on --
5 excuse me. Well, Ms. Polk, if you want to address
6 that last point.

7 MS. POLK: I do want to, Your Honor. Because
8 it was at the 404(b) hearing that what the state
9 was addressing was admissibility of this
10 information under Rule 404(b) to show the absence
11 of mistake in some of the other arguments that we
12 made.

13 The Court's ruling was clear that you
14 were not addressing causation. This is not the
15 same dance or the same song on another day. We
16 have respected that ruling, and we are not reurging
17 reconsideration of the Court's ruling under 404(b).

18 But in the Court's ruling, the Court was
19 clear that the information was not admissible on
20 the basis that it was similar or to show the
21 absence of mistake or accident. That is not why we
22 are addressing it here today.

23 And at the 404(b) hearing the defense
24 never argued the issue of causation. They never
25 argued that some other -- something other than heat

1 had killed the defendants. That's why -- or the
2 victims. I'm sorry. But that's why it's now
3 become relevant, because they have made relevant
4 the issue of causation.

5 On March 1st the Court correctly noted
6 that the 404(b) hearing was limited to -- that you
7 were not reconsidering the 404(b) but that your
8 consideration of the evidence was under the 404(b)
9 factors. And on that date the Court noted that it
10 would be relevant to the issue of causation.

11 And then again on the date that Jennifer
12 Haley testified, which was March 9, the Court again
13 discussed that information about what happened on
14 previous events was relevant to the issue of
15 causation.

16 THE COURT: Thank you.

17 MR. LI: Your Honor, I just -- there's just a
18 couple of things. One is it's the state's burden
19 to explain why its particular evidence is relevant.
20 We noticed causation back in March of 2010 as a
21 potential defense.

22 What does "causation" mean? It means
23 causation. And if the state wants to introduce
24 evidence to rebut our defense about causation,
25 they've got to file motions and explain why

1 particular pieces of evidence are relevant,
2 particularly when we're talking into an area
3 relating to 404(b), where the general rule, Your
4 Honor, is to preclude the evidence.

5 The general rule is to preclude it. And
6 then the state has to show a reason why some
7 exception applies. And it just says, it is not
8 admissible to prove action and conformity
9 therewith. That is exactly what the state is
10 alleging. The state is alleging, oh, you did it in
11 2005, then you must have done it in 2009.

12 That's the exact argument the state is
13 making. And it is exactly precluded by
14 Rule 404(b). So even though they're now labeling
15 it "causation," it is exactly 404(b).

16 Now, the point is that if they had some
17 alternate theory and they wanted to say, hey, Your
18 Honor, you know what? It's not actually 404(b).
19 What it really is is causation, well, they had a
20 motion cut-off date where they could have filed a
21 motion and we could have litigated this and won,
22 frankly, months ago and not be dealing with it
23 today, and not have this risk that we tried eight
24 weeks of a case -- you know -- under a certain
25 ruling and now -- you know -- they have this new

1 theory, well, actually, it's not 404(b). It's not
2 action in conformity therewith. It's not to prove
3 the similarity, which it actually is. But that's
4 not what it is. What it really is is to show this
5 new buzz word, "causation."

6 Yeah. And -- you know -- Ms. Do points
7 out to me that under Rule 404(b), Your Honor,
8 absence of mistake and accident is, in fact,
9 causation. I mean, that's -- that's, in fact, what
10 that means under 404(b). And the Court ruled on
11 exactly this ground in its February ruling.

12 The last thing I'd just say is that --
13 you know -- Dr. Lyon testified here in court. He's
14 the medical examiner who examined at least two of
15 the victims. He said that he could not --
16 basically, his diagnosis was 51 percent that it was
17 heat stroke. 51 percent.

18 And where is the evidence -- what burden
19 are we going to give -- you know -- what burden
20 does the state get to use on these prior acts, even
21 where people have actually died and the medical
22 examiner has actually looked at the bodies,
23 conducted all the tests, looked at the medical
24 records, and has come to a conclusion that it's --
25 you know -- 51 percent chance that these folks died

1 of heat stroke?

2 What burden now? The state can just put
3 up lay witnesses to say, oh, yeah. No tests. No
4 nothing. Just their sort of observations. Oh,
5 yeah. It was all heat-related illness, and they
6 were all on the verge of death. The Court has
7 heard all of those witnesses testify.

8 When we have a medical examiner who can't
9 even say beyond a reasonable doubt that these folks
10 died of heat stroke, now we're going to have some
11 random folks get up there and say, well -- you
12 know -- it looks like heat stroke to me. That's
13 not appropriate, Your Honor.

14 THE COURT: Mr. Li, when you phrase it that
15 way, that really points up what the problem was in
16 the 404(b) hearing. That was presented to me as a
17 404(b) issue with a pretty specific argument
18 regarding the acceptable purpose. And I made a
19 ruling with regard to that.

20 MR. LI: But it's the state's burden to
21 identify what purposes they want to use the
22 evidence.

23 THE COURT: I'm just pointing out I dealt with
24 that as a 404(b) issue. That's what I'm saying.

25 MR. LI: I understand that, Your Honor. But

1 had the state decided that, you know what, we
2 didn't mean 404(b) when we noticed it as 404(b)?
3 Remember, we didn't raise -- we didn't notice it as
4 404(b). The state noticed these events as 404(b).
5 We then, in response and reliance on the state's
6 representations to us as to what purposes it's
7 using evidence, filed the appropriate motions
8 within the appropriate motion cut-off time so that
9 we can shape the litigation in a way that hopefully
10 evidence comes in in an orderly manner.

11 If the state had intended to make some
12 different argument about these prior acts, if the
13 state had said, listen -- you know -- it's 404(b)
14 and it's this other theory of causation, they need
15 to litigate it in an orderly manner, not while
16 we're sitting here eight weeks into trial.

17 And I understand the Court ruled -- you
18 know -- the Court is saying that it ruled on the
19 basis of what it was presented with. I would
20 submit to the Court what it was presented with is
21 what the state indicated it was going to use its
22 evidence for.

23 The defense doesn't -- you know -- the
24 state has a pattern of continually making
25 everything that they do our fault somehow. It is

1 not our burden, Your Honor, to tell the state how
2 it's going to use its evidence. We can only react
3 to what the state tells us.

4 They never ever filed a motion to this
5 court saying, Your Honor, we want to submit all of
6 these prior acts because it demonstrated causation.
7 What they did instead was they filed a 404(b)
8 notice. And we litigated that exact issue. And
9 that's the issue that was presented to the Court.

10 It is not the defense that sandbagged
11 some issue. It's the prosecution that has utterly
12 failed to notify the Court until -- you know -- it
13 comes up with new theories -- you know -- recently
14 that causation is all of a sudden a surprising
15 issue, when we noted causation as a defense in
16 March 2010.

17 THE COURT: First of all, with regard to
18 foundation, it would be helpful if questions were
19 phrased with Rule 602 in mind. Because even asking
20 a question, do you know this, sometimes the
21 response comes back, yes.

22 How do you know?

23 Well, because somebody told me.

24 And if the question is phrased at the
25 outset with 602 in mind, you don't get there. You

1 don't even get that risk of somebody suggesting
2 that somebody else told you some kind of
3 information, and you can avoid that.

4 I've indicated at bench that sometimes a
5 question of that nature, especially when someone
6 very likely has knowledge, will get someone to the
7 area and you can go on and expedite the trial. But
8 that would help.

9 The issue really comes down to 404(b) and
10 whether it even applies in this situation. And
11 I've mentioned before that I've been somewhat
12 puzzled, because a lot of the evidence that I heard
13 at 404(b) was consistent with what evidence that's
14 already come in about what would be expected in a
15 sweat lodge. Very -- very similar. So it's been
16 puzzling that that's been presented.

17 And in some respect it's puzzling that it
18 would be presented in terms of prior bad act. And
19 I know it's other acts. It's not necessarily a
20 prior bad act. But that's really what the rule
21 fundamentally is about, having bad acts come in
22 that would suggest propensity. So the jury is
23 going to ignore what acceptable purpose might be
24 out there and only get the propensity message from
25 it, the improper message.

1 So it's been a very unusual presentation
2 to have really a lot of what was in the 404(b)
3 hearing, essentially, not contested. I did make a
4 finding in that hearing that the state proved
5 various things by clear and convincing evidence.
6 And one thing was the general way in which sweat
7 lodges were conducted previously at Spiritual
8 Warrior.

9 I think and conclude that the issue
10 really comes down to whether this evidence really
11 isn't intrinsic type evidence. I think the overall
12 approach from the state and what's been litigated
13 here is explaining -- or the way I see it, it's
14 some kind of explanation for what happens in 2009
15 and what might be relevant to that. And is it
16 really something -- is it talking about prior bad
17 acts to talk about what happens in sweat lodges?

18 I'm having trouble -- you know -- when
19 it's phrased in the way you -- right at the end,
20 Mr. Li, because that's the way the state phrased
21 it. People were going to come up and, basically,
22 say this is identical conduct year after year after
23 year. Basically, a series of reckless acts year
24 after year after year. That was the way it was
25 urged. And I could not -- I just found that wasn't

1 the case.

2 Dr. Lyon made the distinction between the
3 level of illness. Heat exhaustion, which is not
4 serious, something that can be taken care of,
5 versus heat stroke, which is a life-threatening
6 condition. And I pointed out that there wasn't any
7 evidence of a life-threatening condition at any
8 time prior.

9 When you make your arguments, Mr. Li, you
10 always get back to this is what the state's going
11 to do. And the ruling is very clear that can't be
12 done.

13 MR. LI: Your Honor, my concern is this: This
14 is -- it's our view that the reality of this is
15 that hundreds of people went through this and did
16 not have life-threatening conditions. Okay? I
17 think that's the actual reality of what actually
18 happened from 2005 to 2008.

19 The problem that we have identified in
20 the state's presentation of the evidence is that
21 the way the evidence comes in is almost always
22 inflammatory. And so you have witnesses who are
23 not qualified to talk about any of this, not
24 qualified to make any medical diagnosis, talking
25 about how people were dying, how they were

1 unconscious, how they were in convulsions and all
2 of that. And that has a grossly and unfair
3 prejudicial effect where the jurors are hearing
4 things that are, frankly, just inflammatory. We
5 believe untrue, but just inflammatory. And then
6 they draw the propensity conclusion, which is
7 inappropriate.

8 And I guess the problem that we have is
9 twofold, Your Honor. If this were simply just as a
10 procedural matter to start with. Okay? As a
11 procedural matter, if the state's argument was,
12 well, it's intrinsic and it's causation and that's
13 what it is, that's what they should have said so.
14 That's what they should have said when we were
15 litigating this issue instead of eight weeks into
16 trial.

17 Eight weeks into trial -- and if that was
18 going to be the Court's ruling, that you know what,
19 all this stuff comes in. We're going to have
20 arguments about what it all means. But this -- all
21 of this evidence comes in because it's intrinsic,
22 then our opening statement would have been
23 different. The way we structured our case would
24 have been different. We would be more arguing
25 about these prior -- we would, basically, Your

1 Honor, be having minitrials about the various prior
2 sweat lodges to demonstrate that when some witness
3 gets up there and says some inflammatory comment
4 about what happened and what the various medical
5 conditions are, we would now have somebody say,
6 well, that's actually not true. Here's what
7 actually happened. And then we would have, for
8 each year -- you know -- a few witnesses get up
9 there and sort of argue with each other about what
10 actually happened during those sweat lodges.

11 That's not what the Court wanted to have
12 happen, and that's the way we read this ruling.
13 Because they were not substantially similar.

14 And, Your Honor, I do disagree with the
15 Court's idea that 404(b) is somehow a limited --
16 this ruling is somehow limited. 404(b), first of
17 all, it's not limited to bad acts, as the Court has
18 pointed out. It's other acts. And the main thing
19 we're trying to avoid is the idea of propensity.
20 Okay?

21 And in general, the rule prohibits
22 exactly what the state is proffering. That is,
23 something happened in 2005; therefore, it must have
24 happened in 2009. Something happened in 2007;
25 therefore, it must have happened in 2009.

1 Something happened in 2008; therefore, it must have
2 happened in 2009.

3 That is exactly what the rule prohibits.
4 And the Rule 404(b) hearing was about whether or
5 not these prior acts -- whether these other acts
6 fall within the narrow exceptions to propensity.

7 I would submit, Your Honor, when the
8 statute says -- when -- you know -- absence of
9 mistake and accident is, in fact, causation. That
10 is to say, you didn't accidentally do it; you
11 caused it to happen because you knew. You knew it
12 was going to be this way. I mean, that is -- you
13 know -- causation.

14 And so I don't think that the rule is as
15 narrow as the Court is interpreting -- or stating
16 it is right now. I mean, I think the rule is
17 actually a general preclusion of propensity
18 evidence.

19 THE COURT: Absolutely a general preclusion of
20 propensity evidence. And that's its sole purpose.
21 It would be precluded.

22 MR. LI: Now -- you know -- my partners here
23 point out that the causation that the state noticed
24 was actually this Rick Ross fellow, who is going to
25 testify about cults and large group awareness

1 training, and then Mr. Pace. That's where the
2 state was going with its causation arguments,
3 saying that -- you know -- somehow Mr. Ray's words
4 caused these people to do various things. This
5 whole idea, Your Honor, it just --

6 THE COURT: Mr. Li, thank you. You know,
7 you've made your argument.

8 What has to be avoided is testimony that
9 does not rest on solid foundation. And in the
10 404(b) I saw quite a bit of that. The
11 characterization of the photographs in 2008.
12 People were apparently -- I think you'd see this in
13 the statements that were just given, the transcript
14 of statements. There are hundreds of pages of
15 those where people would say things that were not
16 consistent with what actually was shown here in
17 court.

18 That's a whole different question than
19 what evidence goes to explaining what happened
20 in 2009. And it is easiest to see in terms of
21 prior bad act because there has been no evidence of
22 a prior bad act. The real question is is this
23 really other-act evidence that's being discussed
24 and being proposed?

25 There has been some expert testimony now.

1 There has been the talk of the spectrum of
2 heat-related illnesses. And Dr. Cutshall, to my
3 recollection, testified concerning length of
4 exposure to the heat, that kind of thing, to be a
5 factor. So there has been some expert testimony
6 now.

7 And you recall after hearing Jennifer
8 Haley's testimony, I indicated there would be no
9 testimony regarding prior sweat lodge events until
10 there was expert testimony. And there has been
11 some.

12 I also found with regard to Ms. Haley
13 that the testimony she gave also had what I labeled
14 a non-404(b) purpose. And that -- that's an
15 imprecise term I probably -- would probably not use
16 as much or at least provide some explanation. But
17 that evidence also explained what she was doing and
18 why she did what she did in 2009, what she had
19 mentioned about the 2007.

20 So there has been some expert testimony
21 regarding heat illnesses -- heat-related illnesses.
22 And I indicated in my ruling on the 404(b) -- that
23 was one of the issues that arose there. There was
24 no medical testimony or evidence provided. The
25 only evidence provided was evidence that showed

1 there was no life-threatening condition with Daniel
2 P's records, a nonemergency type situation.

3 So I'm going to permit the evidence.
4 There has to be accurate foundation. It can't be
5 stressed beyond what the witness can provide.

6 And with regard to observations, that
7 they come up regarding any kind of medical
8 condition, there just cannot be
9 mischaracterization. It has to be what is actually
10 observed.

11 Mr. Li.

12 MR. LI: Your Honor, two things. One is this
13 just -- there is no 403 analysis at all in this.
14 And there is a 403 issue here which is going to be
15 highlighted by my second point, which is these are
16 witnesses who -- you know -- the state does not do
17 things to try to control their testimony. The
18 state does not ask questions --

19 THE COURT: Well, Mr. Li, objections can be
20 made. I've allowed a number of bench conferences
21 in this case. I would like to minimize that.

22 Ms. Polk, is anything unclear about what
23 I've said so far?

24 MS. POLK: No, Your Honor.

25 THE COURT: Mr. Li?

1 MR. LI: Your Honor -- I'm sorry. I
2 apologize. This is obviously a bit of a surprise
3 to me. And I did not think that this is what we
4 were going to be doing today.

5 Honestly, Your Honor, this -- we have to
6 talk about our legal options.

7 THE COURT: Well, I'm going to start the trial
8 here in a moment, Mr. Li. And with regard to 403,
9 part of that is what I've mentioned before. The
10 evidence that already has come in about the extreme
11 physical challenge, if you want to phrase it that
12 way, what type of mental state you might
13 experience, those kinds of things. I factored all
14 of that into looking at is this -- if the testimony
15 is appropriately -- it should be very brief.

16 But if there is testimony related to
17 actual observations, I don't see it really
18 extending much beyond what I've just mentioned. So
19 that -- I have made a 403 analysis. I have.

20 MR. LI: What I anticipate hearing, Your
21 Honor, just given these witnesses and given all the
22 time we've spent with them, is that they go out,
23 and then they have to retreat.

24 THE COURT: Well, that's an absolute risk of a
25 mistrial.

1 MR. LI: Yeah. And the problem -- the problem
2 is this: That they have a tendency -- you know --
3 we saw days of it. They have a tendency -- there
4 was 40 people who were dying, and then you have to
5 sort of pull it back.

6 THE COURT: It's -- testimony such as that
7 would risk a mistrial. And there has been
8 sufficient warning now that if that were to happen,
9 it implicates more than just a mistrial.

10 MR. LI: The second point I would make, Your
11 Honor -- the question I would ask, Your Honor, is
12 the Court now intending to allow other witnesses of
13 all of the prior sweat lodges to come in and start
14 testifying about the prior sweat lodges with -- at
15 least with respect to Mr. Mercer and Debbie Mercer,
16 they were at -- you know -- two or three sweat
17 lodges. Okay?

18 There are some people who are at -- you
19 know -- 2005 and no -- at no other sweat lodges.
20 Now, are we going to have those people come in and
21 do we next need now to go get witnesses to rebut
22 all of these?

23 I mean, some of the things these people
24 say are crazy, frankly. There's at least one
25 witness from 2005 who describes Daniel P. who did

1 not have a life-threatening condition, as having
2 his brain boiling. Like literally, that's what the
3 guy said.

4 THE COURT: If that testimony were to come
5 out, there would be real mistrial implications if
6 something like that were to happen.

7 Ms. Polk, we're talking about these
8 hypotheticals. Is there a risk of this?

9 MS. POLK: No, Your Honor.

10 But I want to respond, first of all.
11 Mr. Li's comments have been sprinkled with attacks
12 on the state and what has happened in the past.
13 And I don't want to address all of that except to
14 just state for the record that that is not what has
15 occurred.

16 THE COURT: I'm assuming it's -- well, go
17 ahead. I was looking prospectively. But go ahead.

18 MS. POLK: And prospectively we will direct
19 witnesses to limit their testimony to what they
20 personally have observed. But I would also note
21 that Rule 701, opinion testimony by lay witnesses,
22 allows the witness's testimony in the form of
23 opinions or inferences if they are limited to those
24 opinions or inferences which are, A, rationally
25 based on the perception of the witness and, B,

1 helpful to a clear understanding of the witness's
2 testimony or the determination of a fact in issue.

3 So clearly a witness can testify that
4 they thought the person was unconscious or that
5 they thought that person was vomiting. Those are
6 rational inferences based on what they are
7 observing. And that is admissible.

8 But there has never been a witness who
9 has come into this court and said 40 people were
10 dying. That's just an exaggeration. That hasn't
11 happened. And that won't happen.

12 We will restrict the witnesses to what
13 they have observed, recognizing that Rule 701
14 allows them to use terms that are layperson's terms
15 to describe what they are seeing.

16 THE COURT: And I think a lot of that has been
17 introduced already. I don't think the defense has
18 objected when it's come in in that fashion if it's
19 been a bona fide 701 observation. I don't think
20 that's been the subject of objections.

21 But obviously what you've proffered --

22 And I understand, that there may have
23 been some hyperbole in your statement.

24 But I -- but, Ms. Polk, I do understand
25 what Mr. Li is indicating. Because as I've said,

1 there were hundreds of pages of transcripts
2 indicating people had some characterizations that
3 would not be appropriate.

4 MS. POLK: And I agree with that, Your Honor.
5 Those were just transcripts. That's not courtroom
6 testimony. And I agree with what the Court is
7 concerned about. And again, we will direct
8 witnesses to talk about what they personally have
9 observed.

10 MR. LI: Your Honor, I mean, with all due
11 respect, we have a bench memo that we're going to
12 file shortly relating to prosecutorial misconduct.
13 And with all due respect to Ms. Polk, the reality
14 of this is the state has not observed propriety in
15 asking questions.

16 I will give several examples that are
17 going to be cited in this bench memorandum. Asking
18 questions like -- over the defense objections
19 repeatedly and sustained objections -- things
20 like -- you know -- did people have a choice when
21 they were unconscious in the sweat lodge? Those
22 sorts of thing. Purely rhetorical, purely
23 prejudicial arguments.

24 With all due respect, I have sincere
25 concerns about the state's willingness and ability

1 to restrain itself from eliciting as inflammatory
2 information as it can.

3 I'll give you another, just one point
4 which really sticks in my craw. This idea that the
5 state has twice articulated in court that a
6 settlement is admissible to prove liability. We
7 have it on record twice Ms. Polk herself has
8 stated. That's false. It is just simply wrong.

9 And we have very little faith that the
10 state will constrain itself to this Court's ruling
11 and to be able to keep these witnesses from veering
12 off the track that the Court has laid.

13 THE COURT: Okay, Mr. Li.

14 MR. LI: Your Honor, with all due respect, if
15 this is the direction the Court is going in, we
16 need to figure out whether we're going to move for
17 a mistrial and whether we need to take a special
18 action. Because this -- and I'll let my
19 colleague --

20 THE COURT: We're going to start the trial and
21 have the jury in. Thank you.

22 (Recess.)

23 THE COURT: The record will show the presence
24 of the defendant, Mr. Ray, and the attorneys.

25 Mr. Li, you wanted to make a motion?

1 MR. LI: Yes, Your Honor. We move for a
2 mistrial on several grounds. One ground is the
3 timing of this particular ruling. I think I've
4 already articulated what our position is on that.

5 But to quickly recap, obviously, we
6 formed a defense with the notice that we were given
7 by the Court in its ruling. We understand the
8 ruling to also apply to causation. 404(b) says
9 lack of absence -- absence of mistake or accident.
10 We obviously contend that this was an accident.

11 And so we believe that we were -- you
12 know -- the timing of the ruling has prejudiced us
13 and deprived Mr. Ray of a fair trial.

14 We also would move for a mistrial based
15 on the substance of the ruling. We obviously have
16 articulated our various positions about why we
17 disagree.

18 I would throw in, in addition, there is
19 an issue that we raised earlier about the First
20 Amendment and many other issues relating about the
21 various types of testimony that was elicited by the
22 state relating to Mr. Ray's protected speech and
23 that no guidance has been given. And the state has
24 not made any effort to comply with any of the
25 Supreme Court case law relating to speech.

1 We'd also identify -- another ground
2 would be the state's failure to identify a duty and
3 its continued introduction of purported negligence
4 in the evidence.

5 We also have separately -- are going to
6 prepare and file a bench memorandum relating to
7 conduct by the state relating to its questions --
8 prejudicial questions purposely seeking to elicit
9 improper and inflammatory information; taking legal
10 positions which are, on their face, incorrect;
11 including that relating to the duty issue on
12 negligence cases.

13 And, Your Honor, other things that we
14 would have done differently had we understood this
15 was the Court's ruling, we obviously would have
16 conducted our cross-examination of the experts in a
17 different way. We believe the defense has been
18 severely prejudiced by this. And for these reasons
19 we're moving for a mistrial.

20 Mr. Kelly has something to add about
21 another procedure, which I'm not particularly
22 familiar with. And I'll turn it over to Mr. Kelly.

23 THE COURT: Mr. Kelly.

24 MR. KELLY: Judge, at the appropriate time.

25 And I believe Ms. Polk probably wants to respond to

1 the motion for a mistrial, and we await your order
2 in that regard. But after that, Your Honor, I
3 would like to be heard.

4 THE COURT: Ms. Polk.

5 MS. POLK: Your Honor, just briefly, there's
6 no basis for a mistrial. The Court's order of
7 February 3rd, 2011, was clear that the Court was
8 addressing the 404(b) information purposes only.
9 On March 1st, the day of the opening statements,
10 the Court made it clear that information concerning
11 what occurred at other sweat lodge events at the
12 Angel Valley property would be admissible and would
13 be relevant on the issue of causation. And the
14 Court's language was as it becomes relevant at
15 trial.

16 The Court has made it clear all along
17 that relevant information will be admissible.
18 Specifically addressed it on March 1st and then
19 again on March 9th when Jennifer Haley testified.
20 The Court again made it clear that information
21 relating to causation and the previous sweat lodge
22 events would be admissible subject to the medical
23 information laying the foundation as to the causes
24 of the symptoms and causes of heat stroke and
25 heat-related illnesses.

1 With regard to all the other issues the
2 defense has just raised, some of those matters have
3 been put forth in motion and already addressed by
4 the Court. Others, I believe, are still pending.
5 But none of those would form the basis for a
6 mistrial.

7 THE COURT: Mr. Li, anything else?

8 MR. LI: Your Honor, we would obviously
9 disagree with the state's characterization of the
10 February 3rd ruling. I cannot stress enough that
11 Rule 404(b) prohibits propensity evidence, which is
12 exactly what the state is offering. Rule 404(b)
13 carves out a limited exception for things like
14 absence of mistake and accident. And those would
15 be potentially causation-related issues.

16 The Court's ruling is quite clear that
17 the prior testimony was not -- the prior testimony
18 relating to prior incidents was not admissible for
19 those purposes.

20 This causation issue is sort of a strange
21 hybrid issue that has come up through the arguments
22 relating to organophosphates and what have you.
23 And the only relevant issue, in my view, is whether
24 the sweat lodges are the same or not.

25 Because if you can't prove that the sweat

1 lodges are the same or maintained in the same way,
2 then it's irrelevant what happened at a prior sweat
3 lodges. It does not establish -- here's what could
4 have happened: Somebody could have sprayed some
5 organophosphates into the dirt. They could have
6 sprayed it into the tarps unbeknownst to a lot of
7 different people, certainly unbeknownst to Mr. Ray.
8 And it could have happened in June 2009.

9 And that's the causation issue that we
10 understood the Court was talking about. But this
11 idea that propensity evidence establishes causation
12 is exactly what Rule 404(b) prohibits and what we
13 believe the Court's ruling prohibited.

14 THE COURT: With regard to the timing, I
15 recall, Mr. Li, that your opening statement was
16 actually broken. It was done on one day, and then
17 the next morning we started -- as a matter of fact,
18 I forgot to announce you first, because normally
19 openings are completed on one day.

20 And there was discussion about the
21 potential for this evidence coming in specifically
22 with regard to causation. Is there any dispute
23 about that?

24 MR. LI: Your Honor, it depends on what you
25 mean by "causation."

1 THE COURT: Well --

2 MR. LI: And that's critical, Your Honor.

3 Because if "causation" means lack of mistake or
4 accident -- okay -- which is causation, Your Honor.

5 And that's exactly what the defense theory is:

6 This is an accident. Okay?

7 And so if that's what the Court's ruling
8 was, then that would be a change from the Court's
9 ruling in February 2011.

10 So from our point of view, in February
11 2011 the Court made a ruling that relates to
12 causation, absence of mistake and/or accident.
13 Okay?

14 So we believe that that was what the
15 Court's ruling was vis-à-vis causation.

16 What we understand "causation" to mean,
17 which we don't agree with and is obviously over our
18 objection -- but what we understand this new theory
19 of causation is, is somehow to say that it was not
20 organophosphates or some sort of insecticide or
21 some sort of toxin that killed these folks, but
22 that there was some other cause, some other
23 mechanism that caused these folks to die.

24 And yesterday, we discussed exactly this
25 issue with Mr. Mercer and provided to you the

1 transcript of that discussion, which demonstrates
2 that he has no personal knowledge about the
3 condition of the sweat lodge in October 2009 as
4 compared to any other sweat lodge at any other
5 time.

6 And so we believe that at this point that
7 argument is done. Because now you cannot link the
8 sweat lodge from 2009 in any causal way to an
9 earlier sweat lodge.

10 For instance, if Mr. Mercer -- if this
11 had been a house -- okay? If this had been a sweat
12 house stationed at Angel Valley, and it never
13 changed and we had perfect records of the
14 maintenance and what have you, you could have an
15 argument, then, relating to causation, if it was
16 exactly the same in October 2009 as it was in May
17 2009 and as it was in October 2008. You could just
18 demonstrate it going each time back. Then you
19 could make a causation argument.

20 And we believe that that's what the Court
21 was talking about, that yeah. You might be able to
22 go back and talk about prior sweat lodges if you
23 could establish that there's a link -- you know --
24 either in the harms that took place, which the
25 Court explicitly ruled out, or in the actual

1 material or what have you that is being used in the
2 sweat lodge.

3 Then you could say, well -- you know --
4 we have a perfect chain of custody. This thing was
5 not poisoned in 2008, and yet people -- you know --
6 seemed to get sick. And then in 2009 they die.
7 And you can't -- you know -- this whole --
8 organophosphates or insecticide or any of these
9 things, it's just speculation.

10 Because we've proved that there is no
11 causal link anymore. Okay? And the state can't do
12 that. Okay? The state cannot. Because their
13 witness who assembled the sweat lodge says that the
14 materials are not the same.

15 So, yes, Your Honor. I do -- it was a
16 long-winded way of answering your question. But
17 you asked me whether I dispute that there was a
18 discussion about causation. I do if what the Court
19 means is causation means absence of mistake or
20 accident.

21 If what the Court was talking about
22 relating to causation is are these the same sweat
23 lodges, is there some way to rebut the causal link
24 that we're making here that Mr. Ray somehow caused
25 people to die because he knew that there was

1 organophosphates or something like that in the dirt
2 or in the tarps, that would be -- that's a
3 causation argument that we understand.

4 But we don't understand the reversal of
5 the 404(b) ruling, Your Honor.

6 THE COURT: There has been no reversal of
7 404(b).

8 MR. LI: I understand that that's the Court's
9 position. But that's our position. We believe
10 that if the Court is saying that absence of mistake
11 and/or lack of accident, which are our causal
12 defenses, is encompassed in the ruling in February
13 2011, then our contention is that we did understand
14 that that portion of causation was discussed in
15 your February 2011 ruling.

16 We understood the causation that you were
17 describing having to do with the various -- the
18 form and the maintenance of the sweat lodges and
19 whether there is a link between what happened
20 in 2009, October, and in any other instance.

21 THE COURT: And I think, Ms. Polk, you were
22 only talking about this in the latter sense, of
23 having to do with what was the physical cause of
24 injury.

25 MS. POLK: Correct.

1 THE COURT: Okay. And there may need to be
2 limiting instructions on that.

3 I've said this before, too. There's no
4 summary judgment in criminal actions. There are
5 Rule 20 motions. And I'll address that in the
6 context of duty.

7 I have made clear, I think, there has to
8 be a finding of the duty for an omission that lies
9 outside the criminal statute that's relied on. At
10 the same time, there's no mechanism to implement
11 that other than a Rule 20, essentially, once the
12 matter is at trial. So that's noted.

13 With regard to the First Amendment, I've
14 indicated that in the context of duty, words have a
15 whole different meaning. And I don't want to give
16 hypotheticals. You can think about it, and you can
17 think of a number of hypotheticals. When in the
18 context of a legal duty, somebody makes a
19 representation that somebody else relies on, it's
20 not protected speech.

21 The questions with regard to
22 foundation -- those are questions of weight. As I
23 said, there's not a summary judgment mechanism
24 that's available in this context.

25 So the motion for mistrial is denied.

1 Mr. Kelly.

2 MR. KELLY: Judge, what we would request right
3 now is a brief stay in the jury trial for various
4 reasons. One is I don't believe that we're
5 prepared to go forward given the Court's recent
6 ruling in regards to the cross-examination of the
7 proposed witnesses.

8 I'll provide a simple example. I'm going
9 to cross-examine Debbie Mercer. When she and her
10 transcript of the November testimony spoke of prior
11 act evidence, I skipped over it. When I say "prior
12 act evidence," from the evidence relating from
13 prior sweat lodges. I skipped over that.

14 So in good faith, I don't believe that
15 any of us are prepared to proceed at this point in
16 time given our ethical responsibility to represent
17 Mr. Ray.

18 Secondly and more importantly, Judge, we
19 intend to discuss the propriety of filing a special
20 action to challenge your ruling this morning. And
21 I would ask you to think of this, Judge. If, in
22 fact, that special action were to prevail and the
23 witnesses continue to testify -- well, let me
24 rephrase it.

25 If in the special action we challenged

1 your ruling and the higher court overruled it, in
2 the meantime witnesses were allowed to testify,
3 then we would automatically have a mistrial.

4 So I think the wisdom would dictate that
5 there would be a break in the trial today to allow
6 us to consult as to the propriety of filing a
7 special action.

8 Of course, if we did file the complaint
9 for special action, it would articulate the reasons
10 for the requested stay. But as I stand here today
11 at 10:30 in the morning, we're caught off guard and
12 believe that that's the best we can do.

13 I know, Judge, that within -- after
14 listening to your explanation a moment ago in
15 response to the motion for a mistrial, within a
16 couple of hours, we could notify the Court whether
17 we intended to file the special action. I would
18 say by probably 1:00 or 1:30. Then, of course,
19 there's the actual filing of the brief -- the
20 pleading itself.

21 So that's our request, Judge, is to
22 simply, at least for -- between now and 1:30, to
23 stay these proceedings to allow us to consult.
24 Because we're completely caught off guard. I don't
25 want to reiterate the arguments of Mr. Li, but I

1 was the one that handled the witness Fawn Foster.
2 I heard the representations that was made as to the
3 purposes of this evidence. I listened to your
4 responses. We came prepared today consistent with
5 your responses last Friday, and now we're caught
6 off guard.

7 So whether -- you know -- I'm not
8 implying that that's your fault or anyone else's.
9 It's just simply the fact of the matter. We were
10 proceeding in this case along one course that none
11 of these prior incidents would ever be mentioned;
12 and then all of a sudden, now today they are.

13 And we'll have a witness here in a few
14 minutes -- in fact, the next three or four or five
15 witnesses are all going to discuss those prior
16 sweat lodge incidents.

17 So we'd ask for a brief stay and perhaps
18 longer, if we have more time to consult.

19 THE COURT: Mr. Hughes.

20 MR. HUGHES: Thank you, Your Honor.

21 Your Honor, the state opposes a stay.
22 The issue of whether this evidence could come in
23 for causation purposes was addressed by the Court
24 and the parties early on in March. And the Court
25 made the determination that if there was the

1 medical testimony, that that evidence would be
2 permitted. The defense has been aware of that
3 ruling since early March.

4 Last week the Court addressed the issue
5 involving Ms. Foster and indicated that we could
6 recall her later in our case again if we could lay
7 foundation about the tarps and the structure that
8 was used. So that part of the Court's ruling,
9 again, was something the defense has known since
10 last week, that the state would be permitted to
11 talk about prior sweat lodges with Ms. Foster.

12 The defense has had time since early
13 March, when the Court indicated that it intended to
14 allow causation evidence if the state could lay
15 foundation of what a witness clearly observed and
16 if we could offer that medical evidence that linked
17 it to becoming relevant.

18 The defense has had ample time to prepare
19 a special action on that ruling. The decision
20 today is not a surprise. We're mid trial. We lost
21 an entire day yesterday because of a juror being
22 ill. We were able to get an interview done of
23 Mr. Mercer yesterday. We have an interview set for
24 lunch today of the Hamiltons.

25 But to say that we can delay this trial,

1 which is midway through and has months to go, for
2 an indefinite period of time is unrealistic.
3 Particularly since these issues are not new or
4 novel issues. They're issues that the defense has
5 been aware of for some time.

6 So the state would oppose a stay.

7 THE COURT: Mr. Kelly.

8 MR. KELLY: Judge, if I could reply briefly.

9 First of all, the only thing I agree with
10 Mr. Hughes was last Friday you talked about the
11 foundation which would be necessary to admit
12 evidence regarding the May 2009 sweat lodge
13 constructed by Mr. Mercer.

14 And, Judge, for the record, I would
15 simply ask you to refer to the interview of
16 Mr. Mercer, which, I believe, has been marked as --
17 probably marked as 812 would be the most recent
18 interview, page 10.

19 THE COURT: Go ahead, Mr. Kelly.

20 MR. KELLY: I just -- for the record, Judge,
21 again --

22 MR. LI: If I may approach with a courtesy
23 copy, Your Honor?

24 THE COURT: Okay. Oh. Here it is. What
25 page?

1 MR. KELLY: Page 10 and page 11, lines 1 and
2 2, where Mr. Mercer says, so, you're, basically,
3 guessing?

4 He responds, I guess so. Yes.

5 That's the final conclusion by Mr. Mercer
6 as to the -- as to whether or not the identical
7 materials were used between May of '09 and October
8 of '09.

9 And I agree with Mr. Hughes. When we
10 left on Friday, that was the issue presented by the
11 Court and that's the issue that was addressed by
12 Mr. LI in this interview as set forth as
13 Exhibit 812. Beyond that, Judge, I'm not going to
14 reargue the causation issue that Mr. LI articulated
15 this morning.

16 What I'm saying is in order to protect
17 this jury that a brief stay is necessary to allow
18 us as a defense team to consult whether or not
19 we're going to file a special action. If the
20 answer to that question is yes, we would request a
21 longer stay, a stay long enough for a higher court
22 to address this special action, which, in my
23 experience, would be -- would be by next week.

24 And so if the issue in regards to staying
25 these proceedings is do we want to protect this

1 jury and the evidence thus far? Because I believe
2 there's been limited evidence presented as to prior
3 sweat lodge incidents. Then we could simply
4 proceed.

5 Or if we do file a special action and we
6 do prevail and a higher court says that you cannot
7 go into these prior-act evidence, by that time we'd
8 have an automatic mistrial.

9 So it's simply a common sense request for
10 a stay, one for the next hour, hour and a half,
11 after giving your ruling and response to Mr. LI's
12 motion for a mistrial.

13 And, secondly -- and I suspect our
14 position is to file a special action. But if that
15 is it, to come back after lunch and discuss the
16 timing in regards to the filing of the special
17 action.

18 Judge, my experience is this is not an
19 unusual request that we'd want to protect the
20 trial. I realize it's been eight weeks. Why would
21 we do something that would require us perhaps two
22 weeks from now to start all over again?

23 So, again, I'd request a brief stay until
24 perhaps 1:00 o'clock and then address this issue
25 again.

1 THE COURT: If there is any testimony about
2 physical, mental health effects of prior sweat
3 lodges, it would be very, very brief in any event.
4 There just isn't a lot of relevance going into
5 that. I've said that many times.

6 The -- I've indicated there is already
7 evidence that really suggests such things. I mean,
8 ready inference. If not direct, certainly from the
9 statements that have been admitted.

10 I am not going to grant the request for
11 stay. We're going to continue.

12 I'm going to say, Mr. Hughes and
13 Ms. Polk, think through things carefully.

14 But what I have right now, I don't see
15 justifying a stay. So we will continue.

16 Thank you.

17 (Proceedings continued in the presence of
18 the jury.)

19 THE COURT: The record will show the presence
20 of the defendant, Mr. Ray, the attorneys and the
21 jury.

22 MS. POLK: State calls Ted Mercer, please.

23 THE COURT: Sir, please step to the front of
24 the courtroom.

25 Raise you're right hand and be sworn by

1 the clerk.

2 THEODORE M. MERCER,
3 having been first duly sworn upon his oath to tell
4 the truth, the whole truth, and nothing but the
5 truth, testified as follows:

6 THE COURT: Please be seated here at the
7 witness stand.

8 Sir, please begin by stating and spelling your
9 full name.

10 THE WITNESS: Theodore Martin Mercer;
11 T-h-e-o-d-o-r-e, M-a-r-t-i-n, M-e-r-c-e-r.

12 THE COURT: Thank you.

13 Ms. Polk.

14 MS. POLK: Thank you, Your Honor.

15 DIRECT EXAMINATION

16 BY MS. POLK:

17 Q. Please begin by telling the jury where
18 you were born and raised.

19 A. I was born in Minnesota, raised there for
20 18 years. Then I moved to Arizona, finished up my
21 last year of high school.

22 Q. What sort of town was it where you were
23 raised? How big of a town?

24 A. 2000 people, counting cats and dogs too,
25 I think. It hasn't gotten any bigger since. I

1 haven't been back but once.

2 Q. Are you married?

3 A. Yes. I've been married 25 years.

4 Q. What's your wife's name?

5 A. Debra Mercer.

6 Q. Do you have children?

7 A. I have two children, Sarah and Kyle.

8 Q. Do you have grandchildren?

9 A. Two grandchildren. Skyler and Angel.

10 Q. You mentioned Sarah. How old is Sarah

11 now?

12 A. Nineteen.

13 Q. When did she turn 19?

14 A. November 2nd of last year.

15 Q. When was it that you came out to Arizona?

16 A. Well, the first time I came to Arizona
17 was about 1980. Finished up my last year of high
18 school. I moved to Hawaii for 8, 10 years, then
19 went to Chicago for a year. Then I moved back,
20 1989, I think it was.

21 Q. With your family?

22 A. Yes.

23 Q. Where in Arizona did you and your family
24 then reside?

25 A. It was Phoenix. We came and stayed with

1 my folks for a little while. They were in Sun City
2 West. And then we found a place in Phoenix and
3 moved there.

4 Q. Did there come a time that you came up to
5 the Verde Valley area?

6 A. Yeah. We used to come up here just to
7 have fun in Sedona in the Red Rocks. We'd come up
8 quite often.

9 Q. Did you come to know a place called
10 "Angel Valley"?

11 A. Yes. Eventually we did.

12 Q. How did you learn about Angel Valley?

13 A. On the Internet. My wife found it on the
14 Internet. We were up here, and she said, I found
15 this new place. I think it was Memorial weekend
16 and Sedona was packed and we had nowhere to go. So
17 we ended up going to Angel Valley. And it was --
18 nobody was there, and it was really nice.

19 Q. Did you eventually come to live at Angel
20 Valley?

21 A. Yeah.

22 Q. What year was that?

23 A. 19 -- it was '08 we started living there.
24 March of '08.

25 Q. Do you believe it was -- what year was

1 it -- did there come a time you started doing
2 volunteer work for Angel Valley?

3 **A. Yeah. We volunteered in '07, started**
4 **doing weeding. We'd stay at their cabins every**
5 **once in a while, and then that worked into a job.**

6 **Q.** You say "we." Who was doing volunteer
7 work?

8 **A. My wife and I.**

9 **Q.** Did you have Sarah with you?

10 **A. Sometimes she'd come with us. Yeah.**

11 **Q.** During that period of time, where were
12 you living?

13 **A. I was living in Morristown, Arizona.**

14 **Q.** Is that where you live now?

15 **A. Yes.**

16 **Q.** And would you tell the jury where
17 Morristown is.

18 **A. Morristown is on Grand Avenue as you're**
19 **going past Sun City as you're going to Las Vegas.**
20 **Everyone says that is the Las Vegas road. About 20**
21 **minutes out of Sun City. Either 20 minutes from**
22 **Sun City or 20 minutes from Wickenburg.**

23 **Q.** You mentioned that your volunteer work
24 became a job. When were you actually hired by
25 Angel Valley?

1 **A. Well, we moved there in March of '08.**
2 **That's when my employment started.**

3 **Q.** What were your employment duties?

4 **A. I was the property manager.**

5 **Q.** What did that entail?

6 **A. Well, we'd -- I would take care of the**
7 **buildings to make sure all the maintenance was done**
8 **on them. When people would come for retreats, we'd**
9 **set up the various buildings or outside areas for**
10 **their activities.**

11 **Q.** Will you tell the jury who the owners of
12 Angel Valley are.

13 **A. Michael and Amayra Hamilton.**

14 **Q.** Is that who hired you in March of '08?

15 **A. No. A guy named Gary Palisch hired me.**

16 **Q.** What was Gary Palisch's relationship to
17 the Hamiltons or Angel Valley?

18 **A. He was general manager.**

19 **Q.** Gary hired you?

20 **A. Yes.**

21 **Q.** When was it that you came to actually
22 reside or live out at Angel Valley?

23 **A. It was March of '07. We moved a trailer**
24 **up onto the property and lived in the trailer for**
25 **about a year.**

1 **Q.** I want you to think carefully. You said
2 March of '08 and March of '07. Do you remember
3 which it is that you --

4 **A. It was March of '08 is when we moved**
5 **there. Yes.**

6 **Q.** Is that also when you got the job?

7 **A. Yes.**

8 **Q.** Not March of '07?

9 **A. No. Before that was all volunteer.**

10 **Q.** Did you rent a home out of Angel Valley?

11 **A. Yeah. After we lived there and I lived**
12 **in the trailer for '07 from March to December or**
13 **November. And then in November when I knew our**
14 **employment was going to be terminated there, we**
15 **rented a house. There is two private houses on the**
16 **property. We rented one of them.**

17 **Q.** When was it that you first rented one of
18 the private houses?

19 **A. It was November of '08.**

20 **Q.** 2008?

21 **A. Yes.**

22 **Q.** So to make sure I understand, is it
23 only 2008 that you were living and working out in
24 Angel Valley?

25 **A. Yeah. It was March through December.**

1 **Q.** Of '08. Okay. What happened -- you
2 mentioned when you were terminated. Did you cease
3 to be employed out at Angel Valley at some point?

4 **A. Yes.**

5 **Q.** When was that?

6 **A. That was December of '08.**

7 **Q.** Did you continue to live out there?

8 **A. Yes. We lived there for a whole year**
9 **until the next November of '09.**

10 **Q.** Were you working during that time?

11 **A. No, I wasn't.**

12 **Q.** Had you already agreed with the owners of
13 Angel Valley to do certain events in 2009?

14 **A. Yeah. There was one sweat lodge that I**
15 **agreed to do with a lady named Healing Wolf. And**
16 **that was set up a whole year ahead of time. So I**
17 **was --- I told her that I would do that. Because I**
18 **know her personally and I wanted to be there for**
19 **her too.**

20 **Q.** Do you recall what month and what year
21 that particular event was?

22 **A. I couldn't tell you what month. But it**
23 **was in '09.**

24 **Q.** And you were still living on the property
25 then?

1 **A. That's correct.**
 2 **Q.** And did you perform some work in
 3 connection with that sweat lodge in 2009?
 4 **A. I set up the sweat lodge, and I was the**
 5 **fire keeper.**
 6 **Q.** And then was there a second sweat lodge
 7 in 2009 that you performed services for?
 8 **A. The James Ray sweat lodge. Yes.**
 9 **Q.** Do you recall that that was October
 10 of 2009?
 11 **A. Yes.**
 12 **Q.** You mentioned during the time that you
 13 were property manager building some teepees out at
 14 Angel Valley.
 15 **A. That's correct.**
 16 MS. POLK: May I approach the witness, Your
 17 Honor?
 18 THE COURT: You may.
 19 **Q.** BY MS. POLK: Mr. Mercer, I'm going to
 20 show you Exhibits 830, 832 and 833 and just ask if
 21 you recognize these.
 22 **A. Yes. I recognize them.**
 23 **Q.** What do you recognize them to be?
 24 **A. Teepees that we put up twice. Because**
 25 **the first time we didn't do a very good job at it,**

1 **and we had to redo it. But yeah.**
 2 **Q.** Do you recognize them to be teepees out
 3 at Angel Valley?
 4 **A. Yes. Teepees out at Angel Valley.**
 5 **Because I can recognize the two cabins right next**
 6 **to it.**
 7 MS. POLK: I move for the admission of
 8 Exhibits 830, 832 and 833.
 9 MR. LI: No objection.
 10 THE COURT: 830, 832 and 833 are admitted.
 11 (Exhibits 830, 832 and 833 admitted.)
 12 **Q.** BY MS. POLK: Mr. Mercer, I'm going to
 13 put up on the overhead 830. Will you point to the
 14 teepee that you testified that you put up.
 15 **A. That one right there.**
 16 **Q.** And are you able to tell the jury what
 17 this building next to it is?
 18 **A. It's a house for guests to stay in, just**
 19 **a cabin.**
 20 **Q.** Once you put up the teepees, did they
 21 stay up?
 22 **A. Yeah. They stayed up -- they stayed up**
 23 **all year.**
 24 **Q.** And I'm going to put up on the overhead
 25 Exhibit 832 and ask if you know who was it that

1 would stay, what sorts of clients of Angel Valley
 2 would stay in the teepees?
 3 **A. We put those up specifically for James**
 4 **Ray because there was a lot of people coming, and**
 5 **so we had to have extra room for them.**
 6 **Q.** Do you recall what year you put them up?
 7 **A. Yeah. '08. '08. The same time --**
 8 **just after we built the sweat lodge, we put it up.**
 9 **Q.** I want to ask you a few questions about
 10 the use of chemicals at the Angel Valley Retreat
 11 Center. Are you familiar with a policy by the
 12 Hamiltons with respect to the use of chemicals on
 13 their property?
 14 MR. LI: Objection. Calls for hearsay. Lack
 15 of foundation.
 16 THE COURT: Sustained.
 17 MS. POLK: Your Honor, could his answer -- I
 18 was going to lay foundation. Could his answer --
 19 yes, he is familiar --
 20 THE COURT: We talked about 602. I'm
 21 sustaining the objection.
 22 **Q.** BY MS. POLK: During the time you were at
 23 Angel Valley, did you ever use any chemicals of any
 24 sort?
 25 **A. No. We weren't allowed to --**

1 MR. LI: Move to strike.
 2 He can testify about he knows about.
 3 THE COURT: Sustained.
 4 **Q.** BY MS. POLK: Mr. Mercer, when -- if I
 5 can just ask you, when I ask you a question, if
 6 it's just a yes or no, then just tell me yes or no,
 7 and I'll ask the next question.
 8 **A. Oh. Okay.**
 9 **Q.** My question was did you ever use any
 10 chemicals during the time that you were out at
 11 Angel Valley?
 12 **A. No.**
 13 **Q.** Specifically when you first started
 14 volunteering out at Angel Valley, what chores or
 15 duties were you doing?
 16 **A. We were weeding around the cabins because**
 17 **the weeds were so high. We chopped them down with**
 18 **a hula hoe.**
 19 **Q.** What is a hula hoe?
 20 **A. A hula hoe is a hoe that you hold with**
 21 **two hands, and you swing it back and forth and you**
 22 **cut the weeds down. So you cut them down right at**
 23 **the ground level.**
 24 **Q.** Did you ever use any chemicals to kill
 25 any of those weeds?

1 **A. No.**
 2 **Q.** Any of the people that you were working
 3 with, did you observe anybody else use chemicals,
 4 pesticides or herbicides to get rid of those weeds?
 5 **A. No, I did not.**
 6 **Q.** I'm going to put up on the overhead
 7 Exhibit 140, Mr. Mercer. Do you recognize what
 8 that is a map of?
 9 **A. Angel Valley.**
 10 **Q.** And specifically do you recognize the
 11 areas where you erected teepees?
 12 **A. Yes.**
 13 **Q.** Can you show the jury. Just mark on the
 14 overhead.
 15 **A. It's right there. And the other one is**
 16 **right here.**
 17 **Q.** And can you show the jury where the
 18 cabins were that guests at Angel Valley would stay.
 19 **A. Well, two of them are right here by this**
 20 **teepee, by the first teepee that I showed. So**
 21 **right here in this area. And then all along here**
 22 **were cabins people would stay in. And then this**
 23 **house right here people would stay in. And then**
 24 **this was -- these other two were private houses.**
 25 **And then this house here was the kitchen. So it**

1 **was -- they would stay mostly over here with the --**
 2 **where all the big cabins were.**
 3 **Q.** And, again, these are yes no questions.
 4 **A. Okay.**
 5 **Q.** During the time that you were at Angel
 6 Valley, beginning in 2007 through -- I guess you
 7 haven't testified when it was that you left yet.
 8 From 2007 through 2009 did you ever use any
 9 chemicals at any of the areas you've just shown us?
 10 **A. No, I have not.**
 11 **Q.** Will you show the jury where the sweat
 12 lodge is at Angel Valley. Do you see it?
 13 **A. It's right there.**
 14 **Q.** During your time at Angel Valley, was
 15 that always the location for the sweat lodge?
 16 **A. That's correct. Yes.**
 17 **Q.** And this is a yes/no question. During
 18 your time at Angel Valley from 2007 through 2009,
 19 did you ever use any chemicals in the area of the
 20 sweat lodge?
 21 **A. No.**
 22 **Q.** And did you ever personally observe
 23 anybody else use any chemicals in that area?
 24 **A. No.**
 25 **Q.** Did you ever observe anybody use any

1 chemicals anywhere on the Angel Valley property
 2 from 2007 through 2009?
 3 **A. Just with the laundry. But it was**
 4 **natural soap that we used. I don't know if that's**
 5 **a chemical or not. But no.**
 6 **Q.** Where was the laundry facility?
 7 **A. The laundry facility was in this building**
 8 **here.**
 9 **Q.** And it was you say a natural detergent?
 10 **A. Yeah.**
 11 **Q.** I want to talk a little bit about the
 12 sweat lodge structure and the coverings used on a
 13 sweat lodge. We're going to come back and talk
 14 more about how you constructed the sweat lodge.
 15 But first tell the jury where all of the
 16 coverings that are used for a sweat lodge -- where
 17 were they stored?
 18 MR. LI: Objection. Lack of foundation. Time
 19 frame.
 20 THE COURT: Basis of knowledge also.
 21 Sustained.
 22 **Q.** BY MS. POLK: I'll back up.
 23 Mr. Mercer, during the time you were at
 24 Angel Valley, did you have any job duties with
 25 respect to that sweat lodge?

1 **A. Yes, I did.**
 2 **Q.** And tell the jury when it was that you
 3 first had any duties with respect to the sweat
 4 lodge.
 5 **A. The first time we had any duties was in**
 6 **'07. And we put the sweat lodge together the first**
 7 **time.**
 8 **Q.** Were you an employee or this was
 9 volunteer?
 10 **A. I was volunteering.**
 11 **Q.** Who were you working for?
 12 **A. I guess Michael Hamilton.**
 13 **Q.** And what did you specifically do in 2009
 14 with respect to the sweat lodge?
 15 **A. We got all the blankets and the tarps and**
 16 **everything and put it on top of the sweat lodge.**
 17 **And we put the blankets on first and then the tarps**
 18 **on after that.**
 19 **Q.** Where were the blankets and tarps that
 20 you got? Where did you get them from?
 21 **A. From a pump house about 300 yards or so**
 22 **away from the sweat lodge.**
 23 **Q.** Do you see the pump house on this map?
 24 **A. Yeah. It's right there, I guess. I**
 25 **wasn't sure. That's it right next to the pond.**

1 Q. Is it the blue structure?
 2 A. **Yeah. That I messed up there.**
 3 Q. Does it say "Well P"?
 4 A. **Yeah.**
 5 Q. That's the pump house?
 6 A. **Yeah. That's the pump house.**
 7 Q. Who were you with when you got the
 8 coverings out of the pump house?
 9 A. **My wife, Debbie.**
 10 Q. How did you know that the coverings were
 11 in the pump house?
 12 A. **I think Gary told us that's where they**
 13 **were.**
 14 Q. And then once you got the coverings out
 15 of the pump house, where did you take them?
 16 A. **We took them over by the sweat lodge**
 17 **and -- you know -- they piled them up in the back**
 18 **of my truck. And then we just put them on there.**
 19 Q. You drove them, then, from Well P down to
 20 the sweat lodge?
 21 A. **That's correct.**
 22 Q. Will you tell the jury about how far that
 23 is.
 24 A. **300 yards.**
 25 Q. And will you take a moment to tell the

1 jury just generally are there two parts to a sweat
 2 lodge?
 3 A. **Well, yeah. There is two parts. We have**
 4 **the kiva, the wooden structure that stays in place**
 5 **all the time. We -- it was built there and it was**
 6 **standing there. That's a freestanding wood**
 7 **structure.**
 8 **Then we take the coverings. When they're**
 9 **going to use the sweat lodge or have a sweat lodge,**
 10 **we take the coverings and cover up the kiva.**
 11 Q. What happens when a sweat lodge is over?
 12 What do you do with the coverings?
 13 A. **We take the -- we take all the tarps off**
 14 **and take the blankets off and let them dry and then**
 15 **fold them up and put them back in the pump house.**
 16 Q. During the time -- let's tell the jury,
 17 when was it that you left Angel Valley?
 18 A. **I left living there?**
 19 Q. Yes.
 20 A. **It was November of '09.**
 21 Q. And there was a period you said at the
 22 end of December of 2008 you stopped working there?
 23 A. **That's correct.**
 24 Q. You remained on the property?
 25 A. **Well, I was amongst Angel Valley**

1 **property, but I was in a private house that they**
 2 **didn't own.**
 3 Q. Will you explain that to the jury how it
 4 is that there is a private house in Angel Valley?
 5 A. **Well, I think this a long time ago was**
 6 **homesteaded. And this house right here and this**
 7 **house right here are private property owned by**
 8 **other people. And this is the house here that I**
 9 **rented.**
 10 Q. The remainder of the property is owned by
 11 whom?
 12 A. **Angel Valley. By Michael and Amayra**
 13 **Hamilton.**
 14 Q. And during the time that you were at
 15 Angel Valley then from -- living at Angel Valley
 16 from 2008 through 2009, did you assist with other
 17 sweat lodge events?
 18 A. **Yes, I did.**
 19 Q. Let's talk about the first sweat lodge
 20 that you assisted. You said that it was in 2007?
 21 A. **That's correct.**
 22 Q. And who were you taking direction from?
 23 A. **Gary -- Michael, Amayra and Gary.**
 24 Q. Do you recall how many sweat lodge events
 25 you assisted with in 2007?

1 A. **Three or four.**
 2 Q. Had you ever done a sweat lodge before?
 3 A. **Never even seen a sweat lodge before.**
 4 Q. Never been in one?
 5 A. **Never been in one. No.**
 6 Q. Did you know what they were?
 7 A. **Had no idea.**
 8 Q. Who did you learn, then, from to do what
 9 you had to do?
 10 A. **Well, from Gary, the general manager.**
 11 **That's the person we had most contact with.**
 12 Q. The first sweat lodge that you assisted
 13 in 2007, what was your role?
 14 A. **I assisted being the fire keeper, and I**
 15 **put the lodge together. I put the blankets and the**
 16 **tarps on top of the lodge.**
 17 Q. Okay. And the next sweat lodge that you
 18 did in 2007, do you recall what your duties were?
 19 A. **The same thing. I covered the lodge, and**
 20 **then I assisted with the -- the fire keeper, as a**
 21 **fire keeper.**
 22 Q. Do you believe you did more sweat lodges
 23 in 2007?
 24 A. **As?**
 25 Q. Assisted in some way.

1 **A. Yes. I did three or four of them.**
 2 **Q.** With respect to all three or four, were
 3 your duties the same?
 4 **A. Yes, they were.**
 5 **Q.** And with respect to all three or four,
 6 did you participate in putting the coverings on the
 7 kiva and then taking the coverings off later?
 8 **A. That's correct.**
 9 **Q.** And each time tell the jury where it was
 10 that you found the coverings.
 11 **A. The coverings were in the pump house.**
 12 **Q.** And then each time who was it that
 13 returned the coverings to their place?
 14 **A. My wife and I.**
 15 **Q.** And each time, tell the jury where it is
 16 you returned the coverings?
 17 **A. To the same pump house right there.**
 18 **Q.** Throughout 2007 did you ever store those
 19 coverings in any other place?
 20 **A. No.**
 21 **Q.** And throughout 2007 when you went to get
 22 the coverings to cover a sweat lodge for an event,
 23 did you ever have to find coverings from any other
 24 place?
 25 **A. Sometimes we had to search around for**

1 **tarps, but all the blankets were always right**
 2 **there.**
 3 **Q.** Okay.
 4 **A. Cause we'd use the tarps everywhere.**
 5 **Q.** Because what?
 6 **A. We'd use tarps everywhere.**
 7 **Q.** At the property?
 8 **A. Yes.**
 9 **Q.** To your knowledge, the various tarps that
 10 were used at Angel Valley -- where were they
 11 stored?
 12 MR. LI: Objection. Lack of foundation.
 13 MS. POLK: I can rephrase the question, Your
 14 Honor.
 15 THE COURT: Thank you.
 16 **Q.** BY MS. POLK: Do you know,
 17 Mr. Hamilton (sic) -- you mentioned tarps were used
 18 around Angel Valley. Do you know where the various
 19 tarps were stored?
 20 **A. Yes.**
 21 **Q.** And how do you know?
 22 **A. Because I had to go get them.**
 23 **Q.** And where is it that you would get tarps
 24 from when you needed them for various events?
 25 **A. Mostly in the pump house.**

1 **Q.** Let's talk about 2008. Did you assist
 2 sweat lodge events in 2008 at Angel Valley?
 3 **A. Yes, I did.**
 4 **Q.** Do you recall how many?
 5 **A. Probably another three or four. It's hard**
 6 **to say.**
 7 **Q.** Tell the jury, with respect to the first
 8 sweat lodge that you assisted in 2008, what your
 9 role was.
 10 **A. The same thing. I would cover the -- my**
 11 **wife and I would cover the lodge or someone else**
 12 **would be assisting me. And I would help tend the**
 13 **fire.**
 14 **Q.** Do you know if anybody else ever covered
 15 the sweat lodge in 2008 other than you and your
 16 wife?
 17 **A. Not to my knowledge.**
 18 **Q.** And with respect to each sweat lodge that
 19 you helped cover in 2008, where did you find the
 20 coverings?
 21 **A. In the pump house.**
 22 **Q.** And when you were finished with each one
 23 of those sweat lodges, where did you return the
 24 coverings to?
 25 **A. To the pump house.**

1 **Q.** In 2009 you testified that you assisted
 2 with two sweat lodges?
 3 **A. That's correct.**
 4 **Q.** And we'll talk more in detail about your
 5 roles. But with respect to the coverings
 6 themselves for the sweat lodges used in 2009, for
 7 the first one where did you get the coverings from?
 8 **A. From the pump house.**
 9 **Q.** And when you were finished with that
 10 first sweat lodge, where did you return the
 11 coverings?
 12 **A. To the pump house.**
 13 **Q.** And for the second sweat lodge in 2009,
 14 whose sweat lodges was that?
 15 **A. That was James Ray.**
 16 **Q.** And you assisted in getting the coverings
 17 to create that sweat lodge?
 18 **A. That's correct.**
 19 **Q.** Tell the jury where you found the
 20 coverings for Mr. Ray's sweat lodge in 2009.
 21 **A. In the pump house where we kept all the**
 22 **other ones.**
 23 **Q.** And we'll talk later about what happened
 24 to the coverings after that event.
 25 Were you present in 2007 for a sweat

1 lodge run by Mr. Ray?

2 **A. Yes. That was the first one that we did.**

3 **Q.** And the coverings for that sweat lodge

4 came from where?

5 **A. From the pump house.**

6 **Q.** And when you were finished with that

7 sweat lodge, where did you return the coverings?

8 **A. Back to the pump house.**

9 **Q.** In 2008 did you participate in a sweat

10 lodge run by Mr. Ray?

11 **A. Yes, I did.**

12 **Q.** And did you participate specifically in

13 constructing that sweat lodge?

14 **A. That's correct.**

15 **Q.** And the coverings that you used for

16 Mr. Ray's sweat lodge in 2008 -- where did you find

17 them?

18 **A. The pump house.**

19 **Q.** And when you were through with that

20 event, where did you return the coverings to?

21 **A. The same pump house.**

22 **Q.** You testified that -- in 2007 when you

23 first arrived at Angel Valley, do you recall

24 whether the kiva for the sweat lodge was in place?

25 **A. I'm sorry. Can you repeat that.**

1 **Q.** In 2007, when you first started

2 volunteering at Angel Valley, do you recall whether

3 the kiva for the sweat lodge for that year was in

4 place at the location on the map?

5 **A. Yes, it was.**

6 **Q.** Did you have any role in constructing the

7 kiva?

8 **A. No. Not that one.**

9 **Q.** And you've already testified you had a

10 role in covering it?

11 **A. That's correct.**

12 **Q.** In 2008 was a new kiva constructed?

13 **A. Yes, there was.**

14 **Q.** Did you have a role in that?

15 **A. Yes, I did.**

16 **Q.** What was your role?

17 **A. I assisted building the new kiva.**

18 **Q.** What happened to the old kiva?

19 **A. We tore it down and burned it.**

20 **Q.** Do you recall what month it was that you

21 constructed the new kiva?

22 **A. Well, not exactly the month. But I know**

23 **it was summertime because we were in the water**

24 **collecting sticks, and the water was nice and warm.**

25 **So it was summertime.**

1 **Q.** Mr. Mercer, I'm going to show you some

2 photographs -- exhibits 242, 243, 244, 245, 246 and

3 247. And first just ask if you recognize these

4 photographs?

5 **A. I sure do.**

6 **Q.** And who took these photographs?

7 **A. My wife did.**

8 **Q.** Do you recall when these photographs were

9 taken?

10 **A. I think it was August. August of '08**

11 **because it was nice and warm. August.**

12 **MS. POLK:** Your Honor, I move for the

13 admission of Exhibits 242, 243, 244, 245, 246 and

14 247?

15 **MR. LI:** No objection, Your Honor.

16 **THE COURT:** Okay. Exhibits 242 through 247

17 inclusive are admitted.

18 (Exhibits 242 through 247 admitted.)

19 **Q.** BY MS. POLK: First of all, Mr. Mercer,

20 in August of 2008, when you constructed the new

21 kiva, will you show -- on this map that's on this

22 overhead, show the jury where it was that you built

23 it.

24 **A. In the same spot as the other kiva was.**

25 **Q.** About how many days did it take from

1 getting rid of the old one to finalizing the new

2 one?

3 **A. It took us about five days.**

4 **Q.** I'd like you to take the jury through the

5 construction of the sweat lodge. First of all, who

6 was in charge in August of 2008 in the construction

7 of this sweat lodge?

8 **A. A gentleman called "Singing Bear" came**

9 **in, and he came down and told us exactly where to**

10 **put the sweat lodge -- well, he knew where because**

11 **we were putting it in the same spot. He told us**

12 **how many sticks to gather and where to put the door**

13 **and where to start our first few sticks.**

14 **Q.** And you're saying "us," "he taught us."

15 Who all was involved in building this kiva?

16 **A. I was, my wife was, a lady named Anita**

17 **and another gentleman named Brian.**

18 **Q.** Was Gary Palisch there?

19 **A. He wasn't there helping us build it. No.**

20 **Q.** Okay. Tell the jury, then, beginning --

21 and I'm going to put up on the overhead

22 Exhibit 242. What's the first thing you did to

23 start building the kiva for the sweat lodge?

24 **A. Well, we had to go collect the sticks.**

25 **Q.** What kind of sticks are those?

1 **A. Those are willow sticks.**
 2 **Q. Where did you get them from?**
 3 **A. From the creek right around the property.**
 4 **Q. Will you show the jury -- do you see the**
 5 **creek on this?**
 6 **A. Well, no. But you can tell -- well, I**
 7 **can tell because I know where it is. It's back**
 8 **here. It runs around here and goes around. Well,**
 9 **actually, we went down further. We really searched**
 10 **for a lot of trees.**
 11 **Q. I'm going to put back up on the overhead**
 12 **Exhibit 140. Does this show the creek you're**
 13 **referring to?**
 14 **A. That's correct. And most of the willows**
 15 **came from this area here.**
 16 **Q. Does the willow grow in the water?**
 17 **A. Yeah. Right in the water and right next**
 18 **to it.**
 19 **Q. How do you cut it down?**
 20 **A. With a machete.**
 21 **Q. And then what do you with the willow?**
 22 **A. We get a whole bunch of them. We tie**
 23 **them together. We let them sit in the creek until**
 24 **we've got enough sticks. And then we put them in**
 25 **the back of my truck and brought them to this**

1 **location here.**
 2 **Q. This was your first time doing this?**
 3 **A. Yes.**
 4 **Q. How did you know how many sticks you**
 5 **needed?**
 6 **A. Singing Bear told us.**
 7 **Q. How did you get the sticks from what**
 8 **appears to be straight to what appears to be a bent**
 9 **position?**
 10 **A. Well, we would take an aluminum pipe and**
 11 **pound it into the ground at each one of these spots**
 12 **where we put a stick. And we'd get the stick in**
 13 **there, and we would bend it over and tie it to the**
 14 **next one.**
 15 **Q. Was there anything that you did for the**
 16 **hole that the sticks were going in?**
 17 **A. Well, every hole got an offering and a**
 18 **blessing from each one of us. So when we built the**
 19 **sweat lodge, every time we dug a hole, we put a**
 20 **little offering. I think it was some sage and**
 21 **tobacco, corn meal and something else. I can't**
 22 **remember. And each one of us would say a prayer**
 23 **for the sweat lodge and for good intentions for the**
 24 **sweat lodge.**
 25 **Q. Do you recall how many holes you dug and**

1 **did that for?**
 2 **A. Oh, jeez. 30 maybe or more. I don't**
 3 **remember off hand. No.**
 4 **Q. What did you use to tie the sticks? How**
 5 **did you get the sticks to stay together?**
 6 **A. We would use the natural willow leaf**
 7 **branches, the really thin ones and some twine, some**
 8 **hemp twine.**
 9 **Q. Where did you get that from?**
 10 **A. We got the -- the willow from the creek,**
 11 **and the twine came from the Hamiltons somewhere.**
 12 **I'm not sure where we got that.**
 13 **Q. Will you tell the jury who are the people**
 14 **we see in the photograph.**
 15 **A. The gentleman with the hat there is**
 16 **Brian. He was a friends of Singing Bear's. And he**
 17 **had built sweat lodges before, so he was kind of in**
 18 **the lead. The girl in the purple shirt is Anita.**
 19 **She was a volunteer out there at the time. And I'm**
 20 **standing there with the other hat on.**
 21 **Q. I'm going to put on the overhead**
 22 **Exhibit 243. If you will tell the jury what's**
 23 **occurring in this photograph.**
 24 **A. The same thing. It looks like he's just**
 25 **putting a stick into the ground and making sure**

1 **it's secure and getting it bent over. You kind of**
 2 **had to put your legs around it to bend it so it**
 3 **wouldn't break. And it looks like he's putting**
 4 **some pressure on that. We're getting ready to tie**
 5 **it. Maybe Anita is tying it right there.**
 6 **Q. I'm going to put up Exhibit 244. What is**
 7 **that?**
 8 **A. That's the finished kiva.**
 9 **Q. How long did it take you -- once you**
 10 **started actually putting the sticks together, how**
 11 **long did that process take?**
 12 **A. About three and a half, four days.**
 13 **Q. And what event was coming up in 2008 that**
 14 **you were getting ready for?**
 15 **A. The James Ray sweat lodge.**
 16 **Q. How long once this kiva was**
 17 **constructed -- let me ask you this: What did you**
 18 **do next with respect to building the sweat lodge?**
 19 **A. Well, after we got to that, the finished**
 20 **sweat lodge, the finished kiva, then David Singing**
 21 **Bear came back out and placed four sticks around**
 22 **the sweat lodge and did a prayer to help bless the**
 23 **whole area.**
 24 **Q. Four sticks around the outside or the**
 25 **inside?**

1 **A. Well, they're on the outside of the sweat**
 2 **lodge. So one was, like, right here. And one was**
 3 **over here. One was behind it. And then one was**
 4 **over here with different colored rags on it. I**
 5 **didn't quite understand what it all meant, but he**
 6 **did.**

7 **Q.** In fact. I'm going to put up on the
 8 overhead Exhibit 246. Does that show the stick
 9 with the rags you were just referring to?

10 **A. That's correct.**

11 **Q.** And then going back to Exhibit 244,
 12 what's the next stage to get the sweat lodge ready
 13 for use?

14 **A. We start covering it with blankets.**

15 **Q.** And, again, the blankets came from where?

16 **A. The pump house.**

17 **Q.** How did you know how to cover it?

18 **A. Well, the very first time that we did a**
 19 **sweat lodge, we got a memo from Michael Hamilton**
 20 **through Gary that told us exactly how to put it**
 21 **together.**

22 **Q.** If you will describe for the jury, then,
 23 generally, what sort of coverings did you put on
 24 the sweat lodge?

25 **A. There was a whole bunch of moving**

1 **blankets and old comforters and all that kind -- of**
 2 **electric blankets. And we would cover the kiva**
 3 **with all the blankets first.**

4 **Q.** And then once you had it covered with
 5 blankets, what did you do?

6 **A. Then we would cover it with the tarps.**

7 **Q.** What sort of tarps were there?

8 **A. They're just blue tarps from Home Depot.**

9 **Q.** Did any of the tarps -- could you see any
 10 of the tarps from the inside of the sweat lodge?

11 **A. Well, no. No. You couldn't see the**
 12 **tarps from the inside of the sweat lodge.**

13 **Q.** And what was in between the tarps and the
 14 kiva or the twigs, the sticks?

15 **A. Well, we put all the blankets and the**
 16 **moving blankets and all that on first. And then**
 17 **the tarps would go over the top of that to hold all**
 18 **the moisture and everything in.**

19 **Q.** And did something go on top of the tarps?

20 **A. At first we weren't using this big rubber**
 21 **thing, but after, like, the third sweat lodge I**
 22 **did, Michael came down and said -- you know --**
 23 **we've got this big rubber deal that goes over the**
 24 **top of the whole sweat lodge to seal it. So we**
 25 **started using that too.**

1 **Q.** Did that rubber thing or rubber deal have
 2 a name?

3 **A. The rubber deal.**

4 **Q.** "The rubber deal" is what you called it?

5 **A. The heavy rubber deal.**

6 **Q.** I'm going to put up on the overhead
 7 Exhibit 7. Does that show this rubber thing that
 8 you're describing?

9 **A. Yes, it does.**

10 **Q.** Describe for the jury, first of all, what
 11 color is it?

12 **A. It's brownish.**

13 **Q.** And how big is it?

14 **A. It's huge. It covered that whole sweat**
 15 **lodge. It was really heavy. Except for just a**
 16 **little piece on the back, it would cover the whole**
 17 **thing.**

18 **Q.** Where was this rubber deal stored?

19 **A. It was --**

20 MR. LI: Objection. Lack of foundation.

21 Timing.

22 THE COURT: Sustained.

23 **Q.** BY MS. POLK: I'm sorry. Do you know
 24 where the rubber deal was stored?

25 **A. It was in the pump house.**

1 MR. LI: Move to strike. We need a time
 2 frame.

3 THE COURT: Sustained.

4 **Q.** BY MS. POLK: When was the first time,
 5 the first year, that you saw the rubber cover?

6 **A. Well, I saw it in there the very first**
 7 **time we did it, but I didn't know what it was. And**
 8 **it was so heavy I didn't want to move it. We -- we**
 9 **used it -- we started using it in '08, I think it**
 10 **was.**

11 **Q.** Are you sure?

12 **A. As sure as I can be right now. I'm**
 13 **really bad with times.**

14 **Q.** Is it possible you used it in 2007 as
 15 well?

16 MR. LI: Objection. Leading. Speculation.

17 THE COURT: Overruled.

18 You may answer that.

19 THE WITNESS: I don't think we used it in
 20 2007. I know we didn't use it for the James Ray
 21 sweat lodge.

22 **Q.** BY MS. POLK: You know you did not use
 23 it?

24 **A. We did not. No.**

25 **Q.** In 2007?

1 **A. That's correct.**
 2 **Q.** From the time period that you were at
 3 Angel Valley from 2007 to 2009, do you know where
 4 the rubber cover was stored?
 5 **A. It was stored in the pump house.**
 6 MR. LI: Objection, Your Honor. Move to
 7 strike. I'd ask to take this witness on voir dire
 8 on the foundation issue.
 9 THE COURT: I'm going to sustain the objection
 10 on foundation. I'm not going to have voir dire at
 11 this time. Sustained. 602, essentially.
 12 **Q.** BY MS. POLK: Mr. Mercer, had you seen
 13 this rubber cover in 2007?
 14 **A. Yes, I have.**
 15 **Q.** These are yes no questions. And when you
 16 saw it, where did you see it?
 17 **A. In the pump house.**
 18 **Q.** And did you see the rubber cover in 2008?
 19 **A. Yes, I did.**
 20 **Q.** And on what occasion?
 21 **A. Anytime I went in the pump house.**
 22 **Q.** Was there ever a time in 2008 that you
 23 were in the pump house that it was not there?
 24 **A. No.**
 25 **Q.** And did you also see this rubber cover

1 in 2009?
 2 **A. Yes, I did.**
 3 **Q.** And where did you see it?
 4 **A. In the pump house.**
 5 **Q.** Was there ever a time in 2009 that you
 6 did not see it in the pump house?
 7 **A. No.**
 8 MR. LI: Your Honor, I'd still like to take
 9 this witness on voir dire. There is a lack of
 10 foundation. The man worked there for two days
 11 in 2009.
 12 THE COURT: Mr. LI, I'll permit a few
 13 questions. You may proceed. Go ahead.
 14 Few questions on voir dire.
 15 MR. LI: Your Honor, thank you.
 16 May I use the podium?
 17 THE COURT: Yes.
 18 VOIR DIRE EXAMINATION
 19 BY MR. LI:
 20 **Q.** Good morning, Mr. Mercer.
 21 **A. Hello.**
 22 **Q.** At the end of 2008, you stopped working
 23 for Angel Valley; correct?
 24 **A. That's correct.**
 25 **Q.** And you, essentially, worked two days for

1 Angel Valley in 2009; correct?
 2 **A. That's correct.**
 3 **Q.** And those were to construct the sweat
 4 lodge in about May 2009?
 5 **A. Yeah.**
 6 **Q.** And then the sweat lodge for October 2009
 7 for James Ray International; correct?
 8 **A. Yeah. That would --**
 9 **Q.** That's yes or no.
 10 **A. Yes.**
 11 **Q.** And you've already testified that you had
 12 no other job duties at Angel Valley in 2009;
 13 correct?
 14 **A. That's correct.**
 15 **Q.** You were be the maintenance man in 2009?
 16 **A. No.**
 17 **Q.** You were not the landscaper?
 18 **A. I was not the landscaper.**
 19 **Q.** And, basically, for the remaining 270
 20 some-odd days in Angel Valley, you had no duties
 21 there?
 22 **A. That's correct.**
 23 **Q.** So you say that you got the tarps for
 24 both of the sweat lodges in 2009 from the pump
 25 house; correct?

1 **A. That's correct.**
 2 **Q.** But during the 270 other days of 2009,
 3 you have no personal knowledge how the tarps were
 4 stored; correct?
 5 **A. That's correct.**
 6 **Q.** You were not on site; correct?
 7 **A. I was on -- I was living on the property**
 8 **and I was walking through there.**
 9 **Q.** I appreciate that. But you don't know
 10 how these tarps were stored for the other 270 days;
 11 correct?
 12 **A. No, I don't.**
 13 **Q.** There is no inventory of the blankets;
 14 correct?
 15 **A. No.**
 16 **Q.** There is no inventory for the tarps?
 17 **A. No.**
 18 **Q.** You don't have any sort of records or
 19 anything like that for these tarps; correct?
 20 **A. That's correct.**
 21 **Q.** Now, each time you set up these tarps,
 22 they're set up in a different formation; correct?
 23 **A. Yes.**
 24 **Q.** And the only thing that's consistent is
 25 that big brown thing over the top?

1 **A. Yes.**
 2 **Q.** So every single time you set it up, the
 3 tarps could be one place or another place or
 4 another place; correct?
 5 **A. Sure.**
 6 **Q.** Same with the blankets; correct?
 7 **A. Sure.**
 8 **Q.** You recognize some of the coverings;
 9 correct?
 10 **A. Yes.**
 11 **Q.** So, for instance, the big brown thing,
 12 rubber thing; correct? Yes?
 13 **A. Yes.**
 14 **Q.** And you also recognize a few of the
 15 blankets; correct?
 16 **A. Yes.**
 17 **Q.** Some of them were sewn together?
 18 **A. That's correct.**
 19 **Q.** So you will recognize those; correct?
 20 **A. Yes.**
 21 **Q.** But you also don't recognize a whole lot
 22 lots of blankets; correct? A blanket is a blanket.
 23 **A. A blanket is a blanket. That's correct.**
 24 **But I've -- you known -- seen them before.**
 25 **Q.** But there are some that you don't

1 recognize; correct?
 2 **A. That -- that could be true. Yes.**
 3 **Q.** A moving blanket, a big blue moving
 4 blanket, looks like every other big blue moving
 5 blanket; correct?
 6 **A. That's right.**
 7 **Q.** And with respect to the tarps -- you
 8 know -- these blue tarps from Home Depot -- you
 9 have no idea how to distinguish one tarp from
 10 another?
 11 **A. No. They're all blue.**
 12 **Q.** They're all blue; right?
 13 **A. Blue, blue and gray or blue and brown.**
 14 **Q.** So other than those few tarps and
 15 blankets that you -- strike that.
 16 Other than the big brown rubber thing and
 17 the few blankets that you do recognize, you can't
 18 say -- you have no personal knowledge as to whether
 19 the coverings are exactly the same for every sweat
 20 lodge ceremony; correct?
 21 **A. I have no personal knowledge. But I**
 22 **think they are.**
 23 **MR. LI:** Move to strike.
 24 **Q.** You have no personal knowledge?
 25 **A. No personal knowledge.**

1 **THE COURT:** The motion to strike is granted as
 2 to what the witness thought.
 3 **Q.** BY MR. LI: In fact, when you assembled
 4 the sweat lodge in 2009, you noticed that there
 5 were some new tarps that had been purchased?
 6 **A. Yes. That's correct.**
 7 **Q.** And so, for instance, those tarps for
 8 sure were not in any other sweat lodge ceremony;
 9 correct?
 10 **A. You would think so. Yeah.**
 11 **Q.** And you also have testified and told this
 12 jury that sometimes when you needed to go get
 13 tarps, you would go to other places other than the
 14 pump house; correct?
 15 **A. That's true.**
 16 **Q.** And that's because these tarps were used
 17 all over the property; correct?
 18 **A. Yes.**
 19 **Q.** Sometimes they were used to cover wood;
 20 correct?
 21 **A. Yes.**
 22 **Q.** Sometimes they were used for other
 23 purposes; correct?
 24 **A. That's correct.**
 25 **Q.** And you have no idea, at least in 2009

1 when were you only working two days, what was being
 2 done with these tarps; correct?
 3 **A. That is correct.**
 4 **Q.** Now, you have also told us -- or you told
 5 me, actually, yesterday -- that some of the
 6 blankets were used for other purposes; correct?
 7 **A. Yeah.**
 8 **Q.** Sometimes they were taken out of the pump
 9 house and maybe laid down on the ground to sit on.
 10 **A. That's correct.**
 11 **Q.** And so in 2009 for the 270 days you were
 12 not working for Angel Valley, you have no idea what
 13 those blankets were being used for; correct?
 14 **A. I have no idea.**
 15 **Q.** You don't even know, for instance,
 16 whether or not the tarps and blankets were in the
 17 pump house in January of 2009; correct?
 18 **A. Personally, I didn't go in the pump**
 19 **house.**
 20 **Q.** So you do not have personal knowledge
 21 whether the tarps and blankets were in the pump
 22 house in January 2009; correct?
 23 **A. Correct.**
 24 **Q.** You don't have personal knowledge whether
 25 they were in there February of 2009; correct?

1 **A. That's correct.**
 2 **Q.** You don't have personal knowledge
 3 March 2009; correct?
 4 **A. Yeah.**
 5 **Q.** April 2009?
 6 **A. Yeah.**
 7 **Q.** And that's because you didn't go into the
 8 pump house for the entire year other than those two
 9 days in which you helped assemble the sweat lodges;
 10 correct?
 11 **A. Uh-huh.**
 12 **Q.** Yes or no?
 13 **A. Yes.**
 14 **Q.** Thank you. And you have no idea how
 15 those tarps and blankets were being stored in the
 16 pump house; correct?
 17 **A. Yes and no.**
 18 **Q.** Okay. Well, let me rephrase the
 19 question. In the 270 days that you were not
 20 working in Angel Valley and not walking into the
 21 pump house, you don't know what was going on in
 22 that pump house, did you?
 23 **A. No, I don't.**
 24 **Q.** Okay. So you don't know, for instance,
 25 if somebody walked into the pump house on January 2

1 and did something?
 2 **A. I don't have any idea.**
 3 **Q.** You would have no idea whatsoever?
 4 **A. No.**
 5 **Q.** Now, you have seen rat poison in the pump
 6 house; correct?
 7 **A. Yes.**
 8 **Q.** So when you told this jury that they
 9 don't use chemicals at Angel Valley --
 10 MS. POLK: Your Honor, this goes beyond the
 11 scope.
 12 MR. LI: I'll move on from that.
 13 **Q.** You don't know, for instance, whether rat
 14 poison was used in the pump house?
 15 MS. POLK: Goes beyond the scope.
 16 THE COURT: Mr. Li.
 17 Sustained.
 18 MR. LI: Okay.
 19 **Q.** You do not know whether or not any
 20 additive was used to any of the coverings in the
 21 270 days you were not in the pump house; correct?
 22 **A. Yeah. That's right.**
 23 **Q.** You have no idea for those 270 days you
 24 were not in the pump house how these tarps and
 25 blankets were being maintained; correct?

1 MS. POLK: Your Honor, objection. Mr. Li had
 2 an issue with the rubber covering. He has far
 3 exceeded that. He has entered the into areas the
 4 state has not yet had an opportunity to even
 5 examine the witness on, and now he's doing
 6 cross-examination.
 7 THE COURT: I'm going to allow him to answer
 8 that last question.
 9 MR. LI: Thank you, Your Honor.
 10 THE COURT: You may answer that.
 11 THE WITNESS: Could you repeat the questions,
 12 please?
 13 **Q.** BY MR. LI: You have no idea, in the 270
 14 days you were not in the pump house, what was being
 15 done to any of those tarps or blankets; correct?
 16 **A. That's correct.**
 17 **Q.** You have no personal knowledge about
 18 that?
 19 **A. No.**
 20 **Q.** And you have no personal knowledge about
 21 what was being done to the land in the 270 days you
 22 were not working at Angel Valley; correct?
 23 **A. Yes and no.**
 24 **Q.** You have no personal knowledge; correct?
 25 **A. I didn't work there, but I was walking**

1 **through the property.**
 2 **Q.** You did not have your eyes on that piece
 3 of land where the sweat lodge was for the 270 days
 4 you were not involved in making a sweat lodge;
 5 correct?
 6 **A. Twenty-four hours a day, no. I did not**
 7 **look at it.**
 8 **Q.** So 24 hours a day you did not look at it?
 9 **A. But I did look at the property --**
 10 **Q.** I understand that.
 11 **A. -- in 2009 many times as I walked past**
 12 **it.**
 13 **Q.** But you did not know everything that's
 14 happening on that property?
 15 **A. How could I? No. I did not know.**
 16 MR. LI: Thank you.
 17 THE COURT: Ms. Polk, you may continue.
 18 MS. POLK: Thank you, Your Honor.
 19 May I approach the witness, Your Honor?
 20 THE COURT: You may.
 21 DIRECT EXAMINATION (Continued)
 22 BY MS. POLK:
 23 **Q.** Mr. Mercer, I'm going to show you
 24 Exhibits 795, 796 and 797. And this is just a yes
 25 or no question. Do you recognize these?

1 **A. Yes, I do.**
 2 **Q.** And how is it that you recognize them?
 3 **A. That is the pump house that we stored all**
 4 **the blankets in.**
 5 MS. POLK: Your Honor, I move for the
 6 admission of 795, 796 and 797.
 7 MR. LI: Your Honor, I just don't have -- if I
 8 could just look.
 9 THE COURT: Of course.
 10 Mr. Li?
 11 MR. LI: No objection, Your Honor.
 12 THE COURT: Those three exhibits -- 795, -96,
 13 and -97 -- are admitted.
 14 (Exhibits 795 through 797 admitted.)
 15 **Q.** BY MS. POLK: I'm going to put up 795.
 16 Can you tell the jury what that is.
 17 **A. That is the water pump house.**
 18 **Q.** Was that pump house on the property when
 19 you got there?
 20 **A. That is correct.**
 21 **Q.** And when you left it in 2009, was that
 22 pump house still there?
 23 **A. Yes.**
 24 **Q.** I'm going to put up on the overhead
 25 Exhibit 796. Tell the jury what that is.

1 **A. That's the same pump house.**
 2 **Q.** Is that the door?
 3 **A. Yes, it is.**
 4 MS. POLK: Your Honor, I move for the
 5 admission of exhibits --
 6 THE COURT: Those three are admitted.
 7 **Q.** BY MS. POLK: I'm going to put up on the
 8 overhead Exhibit 797. Understanding that this
 9 photograph was taken, Mr. Mercer, in 2011 after you
 10 left, do you recognize what it is?
 11 **A. Yes, I do is. It's a pump house.**
 12 **Q.** Is that the interior?
 13 **A. Yeah. That's the inside of the pump**
 14 **house.**
 15 **Q.** You've testified that from 2007 to 2009
 16 you always stored and retrieved the coverings and
 17 the rubber deal from the pump house. I'd like you
 18 to describe for the jury how they were stored
 19 inside the pump house.
 20 **A. Well, you can see the table behind --**
 21 **behind the two pressure tanks there. That's where**
 22 **all the blankets would be piled on top of. So we**
 23 **would pile them about that high because we had a**
 24 **lot of blankets. And then the tarps and the big**
 25 **rubber deal was on the floor on each side of this**

1 **because we still needed to get in to get to the**
 2 **pump. So we had it on the side.**
 3 **Q.** I asked you earlier about the use of
 4 chemicals on the property. Did you ever put any
 5 chemicals in the pump house where the coverings
 6 were stored?
 7 **A. I did not.**
 8 **Q.** Did you ever see anything in the pump
 9 house that you believed could be chemicals?
 10 **A. I saw something that looked like rat**
 11 **poisoning, or I assumed it was rat poisoning.**
 12 **Q.** Describe for the jury, first of all,
 13 where you saw it.
 14 **A. Over here there was a little hole where**
 15 **electricity came in. And it was big enough where a**
 16 **mouse or a rat could come in. On this side there**
 17 **was also another hole. So it was -- it was around**
 18 **the hole.**
 19 **Q.** And describe for the jury what the
 20 substance is that you saw -- just tell them what it
 21 looked like.
 22 **A. As far as I remember, it was like**
 23 **granules, like blue and white sand, little bit**
 24 **bigger.**
 25 **Q.** Did you recognize it to be a product used

1 to kill mice?
 2 **A. You know, I saw something on the floor,**
 3 **and I assumed it was rat poison. But I -- I don't**
 4 **know myself if it was actually rat poison or not.**
 5 **Q.** And did you ever put it there?
 6 **A. No.**
 7 **Q.** Do you recall whether it was the first
 8 time you saw it there?
 9 **A. I think it was the first time we went in**
 10 **there in '07.**
 11 **Q.** 2007?
 12 **A. Yes.**
 13 **Q.** Did you ever notice any change to it
 14 between 2007 to 2009?
 15 **A. Not that I can recall.**
 16 **Q.** Did you ever notice any change in the
 17 amount?
 18 MR. LI: Objection. Asked and answered.
 19 THE COURT: Overruled.
 20 If you can answer that.
 21 THE WITNESS: Not that I can recall.
 22 **Q.** BY MS. POLK: And do you have an
 23 observation as to how fresh it was when you saw
 24 it --
 25 MR. LI: Objection.

1 THE COURT: Sustained.
 2 That response is stricken.
 3 Q. BY MS. POLK: Did you ever spray the
 4 tarps with any sort of substance, anything at all?
 5 A. **No. Only water during the sweat lodge.**
 6 Q. Did you ever spray the blankets and the
 7 other coverings that were used for the sweat lodges
 8 with anything at all?
 9 A. **No.**
 10 Q. Did you ever spray the rubber, the brown
 11 rubber covering, with anything at all?
 12 A. **No. Just water just to wash it off.**
 13 Q. Did you ever use bleach anywhere on the
 14 Angel Valley property?
 15 A. **We were not allowed.**
 16 MR. LI: Objection. Move to strike.
 17 THE COURT: Sustained and granted.
 18 Q. BY MS. POLK: Let me just ask you the
 19 question. Yes or no. Did you ever use bleach on
 20 the property?
 21 A. **No.**
 22 Q. We were talking about the rubber cover.
 23 Let me put it back up again. Tell the jury,
 24 then -- these are photographs you testified from
 25 August of 2008. When do you recall the first year

1 or the first sweat lodge that you used the rubber
 2 cover for?
 3 A. **I don't know which sweat lodge it was.**
 4 **But I know that we did three of them, three or**
 5 **four, before Michael came down and said, you know,**
 6 **I've got this big rubber deal to go over the top of**
 7 **it. So that's -- I can't remember dates as far as**
 8 **I know.**
 9 Q. Okay. And after each sweat lodge that
 10 you conducted, where did you store the rubber
 11 cover?
 12 A. **In the pump house.**
 13 Q. Looking at Exhibit -- let's see. 246.
 14 Who is that in the photograph?
 15 A. **I believe that's me.**
 16 Q. And you have piled here some wood?
 17 A. **Yes.**
 18 Q. Tell the jury what was in that location.
 19 What's the purpose?
 20 A. **That's where we have the rocks to heat**
 21 **them up.**
 22 Q. Okay. We'll come back to that in a
 23 moment.
 24 The -- I see two sticks with flags, it
 25 appears to be. Is that correct?

1 A. **Yes. There is another one over here and**
 2 **there will be another one behind the sweat lodge**
 3 **also.**
 4 Q. Did those get taken down or remain
 5 standing?
 6 A. **They were standing.**
 7 Q. Then I want to show you Exhibit 245 and
 8 have you tell the jury what that is.
 9 A. **That's the inside of the kiva with my**
 10 **wife and my dog.**
 11 MR. LI: Counsel, which exhibit?
 12 MS. POLK: 245.
 13 Q. Do you know if this is a completed sweat
 14 lodge at this point in terms of the coverings?
 15 A. **It wasn't quite complete yet because I**
 16 **can still see light over here and -- you know --**
 17 **there is still some light coming in from the other**
 18 **side of the blanket. So we had more covering to**
 19 **do.**
 20 Q. What we're seeing right here -- is that a
 21 blanket or a tarp?
 22 A. **No. That's a blanket.**
 23 Q. All along there?
 24 A. **Yeah.**
 25 Q. What is this up here?

1 A. **Those are blankets also.**
 2 Q. You talked about still seeing some light
 3 come in.
 4 A. **Yeah. Right here you can see light**
 5 **coming in through -- through the blanket. So we**
 6 **had to make sure we put some extra tarps and stuff**
 7 **over it so it darkens it out so there is no light**
 8 **that comes in at all.**
 9 Q. Let me ask you about this in the middle.
 10 What is that?
 11 A. **That's the hole where the hot rocks go**
 12 **into.**
 13 Q. How deep did you make that hole?
 14 A. **Two feet, maybe two and a half feet.**
 15 Q. And then what are these -- purposes of
 16 these sticks?
 17 A. **They're supports for the kiva. Because**
 18 **got a little weak in the middle there. Being such**
 19 **a big one, you needed some extra supports.**
 20 Q. What are these up here, these colorful
 21 things?
 22 A. **Those are prayer beads that we put**
 23 **together with the direction of David Singing Bear.**
 24 **We put them on the inside and the outside of the**
 25 **sweat lodge.**

1 Q. Do they stay up when the sweat lodge is
2 not in use?

3 A. Yes, they do.

4 Q. When the sweat lodge is not in use, then
5 tell the jury what comes down.

6 A. The blankets. All the blankets and the
7 tarps. The big rubber deal comes off. And we lay
8 them out in the ground so they'll dry and then fold
9 them up and put them in the pump house.

10 Q. I'm going to put up on the overhead
11 Exhibit 247. Do you recognize that?

12 A. Yes, I do.

13 Q. I want to ask you specifically about what
14 we see here. What is that?

15 A. That's the door.

16 Q. Tell the jury how you make the door.

17 A. Well, I have a couple of big sleeping
18 bags that I tie to a stick. And then we take two
19 ropes to put over the top of the sweat lodge so it
20 won't fall down, to get it -- to get it to stay
21 there. And then the sleeping bags go over the door
22 to block out any sunlight.

23 Q. How do you attach the door to the rest of
24 the sweat lodge?

25 A. It's not attached. It's just sitting on

1 top. See the two ropes here that go across the
2 back? They're attached to rocks on the other side
3 so the whole thing won't side down in front of us.
4 But it's attached to this long stick there, and
5 then it just hangs.

6 Q. Okay. And these sleeping bags that were
7 used to make the door -- where did you store them
8 in between uses?

9 A. In the sweat lodge.

10 Q. This colorful stuff around here -- what
11 is that?

12 A. That's part of the door. So when we
13 built the sweat lodge, they -- Brian wrapped the
14 door with willow leaves, and then he put some other
15 string on it. I can't remember what kind. I think
16 this colorful stuff there might be just part of the
17 blankets sticking out.

18 But there was something wrapped around
19 the door -- string that would wrap around. And it
20 was like another prayer bead like the one that went
21 up in the inside.

22 MS. POLK: Your Honor, counsel has agreed to
23 admit Exhibits 241, 239 and 238.

24 THE COURT: The numbers again, please?

25 MS. POLK: 238, 239, 241.

1 THE COURT: Those exhibits are admitted.

2 (Exhibits 238, 239 and 241 admitted.)

3 Q. BY MS. POLK: I'm going to put up on the
4 overhead Exhibit 238, which is from May of 2009, I
5 believe.

6 Do you recognize that?

7 A. Yeah. That looks like a sweat lodge that
8 was already done.

9 Q. And what do you mean "already done"?

10 A. Well, that the rocks have been burnt up
11 and somebody had already done a sweat lodge in it.
12 That's probably the next day.

13 Q. When you say the rocks have already --
14 show the jury specifically, for example, what this
15 is.

16 A. Well, that's the fire pit that we heat
17 the rocks in. And we just get them as hot as we
18 can before they go into the sweat lodge. And all
19 these other rocks around the property, around the
20 sweat lodge, are probably the rocks that were in
21 that hole, and we took them out that morning.

22 Q. Okay. I'm going to put up on the
23 overhead Exhibit 239, which is a close up. Again,
24 if you can just tell the jury, then, for example,
25 what kind of material that would be right there.

1 A. That's probably one of the tarps and the
2 blankets there.

3 Q. Do you think it's a tarp if it's on the
4 inside?

5 A. Well, see -- looks more like a blanket to
6 me.

7 Q. Okay. What did you start to say?

8 A. Well -- you know -- you cover the thing
9 with the blankets first. So then you put the tarps
10 on top of it. And sometimes -- you know --
11 especially around the door something could be
12 sticking out. You know, a piece of the tarp or
13 something.

14 Q. And I want to put up on the overhead 241.
15 Do you recognize that?

16 A. Yes. That's the inside.

17 Q. You've talked about blue moving blankets.
18 Do you see them in this photograph?

19 A. Yes.

20 Q. Show the jury where they are.

21 A. They're here and they're here. I see
22 some there and one there and one here and one here.

23 Q. Those are blankets?

24 A. Yeah. Those are moving blankets. We
25 have some gray ones too. Kind of the same.

1 Q. What is a moving blanket?
 2 A. I guess a moving blanket is one of those
 3 blankets you get from, like, Budget or something
 4 when you rent a truck to move your house and wrap
 5 your furniture and stuff with.
 6 Q. How many layers of blankets do you put on
 7 the sweat lodge before you put the tarps?
 8 A. Oh, probably two. In some places there
 9 would be three or four in layers. But it just all
 10 depends on how well it blocked out the sun.
 11 Q. When you put the coverings on your kiva
 12 for each sweat lodge, do you always put them in the
 13 exactly the same order?
 14 A. Oh, no.
 15 Q. And when you put the tarps on top of the
 16 blankets, do you always put the tarps in exactly
 17 the same order?
 18 A. No.
 19 Q. What are you trying to do with the
 20 blankets and tarps in terms of order?
 21 A. It's just to make sure that we block out
 22 any light or any air that would be coming in and
 23 out of the sweat lodge.
 24 Q. And once you started using the rubber
 25 deal, does that just go on one way?

1 A. Yes. Because there is a door cut in it.
 2 So we have to put it on the same way every time.
 3 Q. You testified earlier about drying out
 4 the blankets and the sleeping bags after a sweat
 5 lodge.
 6 A. Yes.
 7 Q. Why do you do that?
 8 A. Because when they throw the water on the
 9 rocks, there is so much steam made that they get
 10 wet.
 11 Q. For the sweat lodges that you assisted in
 12 2007, did you need to dry out the blankets after
 13 each sweat lodge?
 14 A. Sure.
 15 Q. And for 2008 did you need to dry out the
 16 blankets for each sweat lodge?
 17 A. Yes.
 18 Q. How about for 2009?
 19 A. Yes.
 20 Q. How did you dry out the blankets?
 21 A. We put the tarps on the ground and put
 22 the blankets on top of them.
 23 Q. And about how long did it take to dry out
 24 the blankets?
 25 A. A few hours. Depended on what time of

1 the year it was.
 2 Q. In conducting -- during the time that you
 3 participated in assisting with sweat lodge
 4 ceremonies performed at Angel Valley, did you ever
 5 have the opportunity to touch the rubber -- during
 6 the time that the rubber deal was used, did you
 7 ever have an opportunity to touch it during a
 8 ceremony?
 9 A. Sure.
 10 Q. And was it ever hot?
 11 A. No.
 12 Q. And did you ever have an opportunity to
 13 touch the tarps during your time at Angel Valley
 14 during a sweat lodge ceremony?
 15 A. Well, the first couple sweat lodges we
 16 did because we didn't use the big rubber deal. But
 17 yes.
 18 Q. And did the tarps ever get hot?
 19 A. No.
 20 Q. Let's go through, Mr. Mercer, the sweat
 21 lodge ceremony itself and have you explain to the
 22 jury what you did to assist the ceremony.
 23 First of all, once the -- I'm going to
 24 put up on the overhead Exhibit 145. That's already
 25 admitted into evidence.

1 Do you recognize that?
 2 A. Yes, I do.
 3 Q. And are you in that picture?
 4 A. I think I'm drinking water right there.
 5 Q. Do you recognize this to be the --
 6 Mr. Ray's sweat lodge ceremony in October of 2009?
 7 A. I couldn't tell you.
 8 Well, yeah, because we put the tarps on
 9 the ground there for people to lay on.
 10 Q. Okay. And I just want to talk about the
 11 ceremony. And if you can refer to that picture to
 12 help talk about the ceremony, then you can.
 13 Let's talk about 2007. You had testified
 14 that your role was an assistant fire keeper?
 15 A. That's correct.
 16 Q. Who did you assist?
 17 A. Gary Palisch.
 18 Q. Tell the jury what a fire keeper does for
 19 the ceremony.
 20 A. A fire keeper -- the fire keeper holds
 21 the energy of the fire. So what we do is we heat
 22 the rocks. We -- before we even heat the rocks or
 23 build a fire, we bless the rocks and give them an
 24 offering and do a prayer for them because we know
 25 they're going into the sweat lodge. We want them

1 to be energetically dear as possible.

2 We heat the rocks. We make sure that
3 they're always covered by fire and sticks, that
4 they're never exposed to the air so they can get as
5 hot as possible.

6 Q. I'm going to put it back up on the
7 overhead Exhibit 238 since you're talking about
8 heating the rocks. Do you see the type of rock
9 used in this photograph?

10 A. That's correct. The rocks that we use
11 for the sweat lodge are these here and the ones in
12 the pit.

13 And then after we're done with the sweat
14 lodge, we never use the same rocks twice. So we
15 always we have -- a little wall starting building
16 up with the used rocks.

17 Q. Where do you get those rocks from?

18 A. They're laying around on the property.

19 Q. Do you know what kind of rocks they are?

20 A. They're lava rocks.

21 Q. Whereabouts on the property do you find
22 them?

23 A. All over.

24 Q. Do you find them down in the creek area?

25 A. Yeah. That's, basically, where we go.

1 The rest of it is more manicured. So they would be
2 done down by the creek.

3 Q. You talked about this wall over here of
4 the used rocks. When did you start building that
5 wall?

6 A. Well, the wall was already started
7 building before we even got there. So we just kept
8 adding to it.

9 Q. I'm going to put back on the overhead,
10 then, Exhibit 145. You talked about heating the
11 rocks in a fire. Does this exhibit show the fire
12 that you heated the rocks in for Mr. Ray's sweat
13 lodge in 2009?

14 A. That's correct.

15 Q. Tell the jury what you are concerned with
16 in heating the rocks.

17 A. That they get as hot as possible. We
18 heat them up so they're glowing red if we can.

19 Q. How do you get them as hot as possible?

20 A. We build a big fire over the top of them.
21 Make sure there is no rock exposed to the air. And
22 we make sure that there is always a fire around it.

23 Q. How much time prior to the beginning of a
24 sweat lodge ceremony do you start heating your
25 rocks?

1 A. Usually two hours.

2 Q. You talked about in 2007 your role as
3 assistant fire keeper. What did you do, then, as
4 assistant fire keeper?

5 A. I pretty much tended the fire. And when
6 they called for rocks, we'd open up the fire and
7 pull the rocks out and bring them to the door, hand
8 them to the person inside the door.

9 And then after we got all the rocks in,
10 we would cover the all the rocks back up with new
11 wood and make sure that they were burning properly.

12 Q. What's the difference, then, between what
13 the fire keeper does and the assistant fire keep?

14 A. Well, the fire keeper is actually
15 somebody that needs to be right at the door the
16 whole time. So Gary was actually the official fire
17 keeper, the person who stays on the outside. But
18 he needs help, so I was helping him.

19 Q. Okay. In 2008 -- at some point did you
20 move from assistant fire keeper to a different role
21 with respect to the sweat lodges that you assisted
22 at Angel Valley between 2007 and 2009?

23 MR. LI: I'd ask this picture be taken down.
24 This is 2009, October, and we're talking about
25 other sweat lodges.

1 MS. POLK: I can take it down, Your Honor.

2 THE COURT: Okay.

3 THE WITNESS: After Gary Palisch left, then I
4 took over as the fire keeper.

5 Q. BY MS. POLK: And when was that?

6 A. December of '08.

7 Q. How many sweat lodges after Gary Palisch
8 left were you the fire keeper for?

9 A. Two.

10 Q. They were the May and October of 2009?

11 A. That's correct.

12 Q. I'm going to put up on the overhead
13 Exhibit 145, understanding that it's the October
14 of 2009, Mr. Ray's sweat lodge ceremony. Because I
15 want to direct your testimony to, again, the fire.

16 Generally speaking, where would you find
17 the wood to heat your rocks?

18 A. Generally speaking, there was just -- in
19 this direction there was a big wood pile. And a
20 lot of it was cut out of there. It would be
21 stacked ready for us to use.

22 Q. Do you know where the wood from -- that
23 was in the wood pile came from?

24 A. Yeah. From another wood pile just about
25 a hundred yards over from the sweat lodge.

1 Q. Do you know who cut the first wood pile,
2 the one that was hundred yards away?

3 A. **Well, no. That wasn't cut wood. That**
4 **was all old construction wood.**

5 Q. Now, specifically talking about 2009,
6 then, where was the pile of construction wood?

7 A. **The pile of construction wood was still**
8 **the same spot, but it was a lot smaller because**
9 **they cut a whole bunch of it for us to use for the**
10 **sweat lodge.**

11 Q. When did you first become aware -- in
12 your experience at Angel Valley, when were you
13 first aware of a pile of construction wood that was
14 about hundred yards away from the sweat lodge?

15 A. **The day that I went there the first time.**

16 Q. During the time that you did sweat
17 lodges, where did you get the wood from for your
18 fire?

19 A. **Mostly around the creek. There was a big**
20 **pile of dead wood right on the other side, right**
21 **over here where we would cut things up.**

22 Q. Did you ever use wood from the
23 construction pile of wood to build fires?

24 A. **Sometimes. Yes.**

25 Q. Tell the jury when it is, if you recall.

1 A. **In '08, I think it was, we started using**
2 **that stuff because we were cleaning up the property**
3 **and wanted to get rid of some of that wood. So we**
4 **started cutting that up.**

5 Q. For Mr. Ray's ceremony in October
6 of 2009, tell the jury where you got the wood from
7 to heat your rocks.

8 A. **Well, it was sitting just right by the**
9 **fire there because it had already been cut and**
10 **stacked for us.**

11 Q. Was it construction wood?

12 A. **As far as I know, it looked the same as**
13 **the construction wood that was a hundred yards**
14 **away.**

15 Q. And you had used construction wood for
16 past sweat lodges?

17 MR. LI: Objection. Leading.

18 THE COURT: Sustained.

19 Q. BY MS. POLK: Did you use construction
20 wood prior to October of 2009 to heat your rocks?

21 MR. LI: Objection. Vague. How much
22 construction wood. That's not his testimony.

23 In 2009, October, it was all construction wood.

24 MS. POLK: Your Honor, I'll get there. This
25 is yes or no.

1 THE COURT: Ms. Polk, I'm going to sustain as
2 to form.

3 Go ahead and ask a question.

4 Q. BY MS. POLK: For the sweat lodge that
5 you did in May of 2009, where did you get the wood
6 from to heat your fire?

7 A. **In 2009 it was all stacked for us just on**
8 **the other side of this fire pit.**

9 Q. For both --

10 MR. LI: It's not clear what the witness is
11 testifying about. I'd move to strike.

12 I think we need to delineate different
13 times and identify what wood we're talking about.

14 MS. POLK: And, Your Honor, that's what I'm
15 attempting to do.

16 THE COURT: Excuse me. Overruled.

17 You may continue, Ms. Polk.

18 Q. BY MS. POLK: I'm sorry. The answer to
19 the question about where the wood came to heat the
20 rocks for the ceremony in May of 2009 was what?

21 A. **It was stacked -- it was cut and stacked,**
22 **waiting for us just on the other side of the fire**
23 **there where we can't see.**

24 Q. Did you use any wood from the creek for
25 your May of 2009 fire?

1 A. **No, we did not.**

2 Q. And for your October of 2009 fire, did
3 you use any wood from the creek?

4 A. **Yeah. I think so.**

5 Q. What do you recall?

6 A. **Well -- you know -- it was always a**
7 **mixture of wood usually. The first few sweat**
8 **lodges we did was all wood around the creek, so**
9 **natural wood. And after we started cleaning up and**
10 **wanted to get rid of some of the stuff around the**
11 **property, then we started cutting up that wood.**

12 Q. And do you recall when it was that you
13 started using some of the wood from the property --
14 the construction wood?

15 A. **Sometime in '08.**

16 Q. Mr. Mercer, when you heat those rocks,
17 then, will you explain to the jury, for you how
18 close are you getting to that fire?

19 A. **Oh. I'm almost in the fire. Because**
20 **when they call for rocks -- you know -- all the**
21 **rocks are covered by the fire and the sticks. So**
22 **you got to get in there and open it up, make a spot**
23 **where there isn't any fire so you can get in and**
24 **get the rocks. We use a little extension on**
25 **shovels and stuff so we wouldn't get too hot. But,**

1 **yeah. I've been burned before.**

2 **Q.** For what period of time -- let's talk
3 about October 2009. For what period of time was
4 your exposure to that fire, as you've just
5 described?

6 **A. Well, it would probably take two or three**
7 **minutes to get enough rocks out. It depends on how**
8 **many they call for. If they only call for a**
9 **couple, you can just grab those and go. But if we**
10 **had to get ten or more, then it would take a few**
11 **minutes to get them all out.**

12 **Q.** And in terms of the entire sweat lodge
13 ceremony, then, can you estimate for the jury how
14 many times -- how many minutes you're exposed that
15 closely to the fire.

16 **A. I would say approximately at least a half**
17 **and hour. Right on top of it kind of inside the**
18 **fire almost.**

19 **Q.** When you're not right on top of it
20 getting a rock out, what were you doing with
21 respect to the fire?

22 **A. Making sure that it was covered up.**
23 **Making sure that no rocks were exposed and**
24 **everything was burning around it. I'd throw more**
25 **wood on it and step back so I wouldn't be so hot.**

1 **Q.** In October of 2009 for Mr. Ray's sweat
2 lodge ceremony, did you ever get sick after being
3 close to that fire?

4 **A. No.**

5 **Q.** And in May of 2009 did you ever get sick
6 after being close to the fire you used then to heat
7 the rocks?

8 **A. No.**

9 **Q.** And for the sweat lodge ceremony that you
10 did in 2008, did you ever get sick after your
11 exposure to the fire that was used to heat the
12 rocks?

13 **A. No, I didn't.**

14 **Q.** For the sweat lodge ceremony you did in
15 2007, did you ever get sick after your exposure to
16 the fire used to heat the rocks?

17 **A. No.**

18 MS. POLK: Your Honor, I see that it's noon.
19 Would you like me to stop?

20 THE COURT: Yes. Thank you, Ms. Polk.

21 Ladies and gentlemen, we will take the
22 noon recess at this time. Please remember the
23 admonition, of course.

24 And then I also want to tell Mr. Mercer
25 to please follow -- you must follow the rule of

1 exclusion of witnesses, which has been invoked in
2 this case. You're nodding your head, so I think
3 you understand.

4 THE WITNESS: Yes, I do.

5 THE COURT: It's been explained. It means you
6 can't communicate with any other witness about your
7 the case or your testimony until the trial is
8 completely over.

9 THE WITNESS: Okay.

10 THE COURT: It's a good idea not to
11 communicate with anyone else until the case is
12 over. However, you can talk to the lawyers as long
13 as other witnesses are not present.

14 Do you understand?

15 THE WITNESS: Yes. Can I have lunch with my
16 wife?

17 THE COURT: You just cannot discuss your case
18 or your testimony in any way with any other witness
19 or communicate with somebody that might get
20 information that you've testified about to someone.
21 So nothing about the case or the people involved in
22 it. Anything at all related to the case, you
23 cannot talk about that with other witnesses.

24 THE WITNESS: I understand.

25 THE COURT: Okay. Thank you.

1 We will be in recess.

2 (Recess.)

3 THE COURT: The record will show the presence
4 of the defendant, Mr. Ray; the attorneys, the jury.
5 The witness, Mr. Mercer, has returned to the stand
6 having previously been sworn.

7 Ms. Polk.

8 MS. POLK: Thank you, Your Honor.

9 **Q.** Good afternoon, Mr. Mercer.

10 **A. Hello. How are you?**

11 **Q.** Good. When we stopped for lunch, we were
12 just beginning to speak about the sweat lodge
13 ceremony itself. You have testified about the role
14 of the fire keeper and the assistant fire keeper.
15 Will you tell the jury what other functions are
16 performed to make a sweat lodge ceremony happen.

17 **A. Well, usually the fire keeper, the**
18 **official fire keeper, is usually a door keeper**
19 **also. And that's why he has assistants working**
20 **with him to take care of the fire. Because the one**
21 **that's in charge is in charge of the door -- the**
22 **outside of the door of the sweat lodge.**

23 **So that person must be vigilant about**
24 **what's going on in the sweat lodge so when they**
25 **want the door open or they need something for the**

1 sweat lodge inside, that he will be there right
 2 there to take care of the things.
 3 Q. What other assistants are there normally,
 4 in your experience?
 5 A. Well, there is usually a couple people
 6 taking care of the fire, one person at the door.
 7 And then usually we had another person that
 8 would -- we would switch off. Depends on how many
 9 people we had. Brush off the rocks when we bring
 10 them in. They'd be in the hot fire. We get all
 11 the ash and everything off of them before they
 12 could go into the sweat lodge.
 13 Q. What about the water? Who gets water for
 14 the ceremony?
 15 A. We do. We get the water. There is
 16 buckets out there we wash out. And then there is a
 17 hose that we run from a spigot that's about hundred
 18 yards away. And we fill up the water from the
 19 well.
 20 Q. And who runs the ceremony itself?
 21 A. The person who is inside the sweat lodge.
 22 The "pourer," I guess I call him. He's the one
 23 that's in charge with what's going on with the
 24 sweat lodge.
 25 Q. Have you ever run a sweat lodge ceremony?

1 A. No.
 2 Q. In talking about 2007, the sweat lodge
 3 ceremonies that you assisted, you've already
 4 testified that your role was as an assistant for
 5 those ceremonies?
 6 A. That's correct.
 7 Q. Do you recall for the first ceremony that
 8 you assisted, who was the pourer, the person inside
 9 running the ceremony itself?
 10 A. Well, the very first one was James Ray.
 11 Q. Do you recall what month that was?
 12 A. It was in the summer, I remember, because
 13 it was really warm. But I can't tell you what
 14 month it was.
 15 Q. Okay. Do you recall the second sweat
 16 lodge ceremony that you had a role at in 2007?
 17 A. Yeah.
 18 Q. Do you recall who the pourer was or the
 19 person who was inside running the ceremony?
 20 A. I can't remember his name. No. I don't
 21 remember who was in there at that time.
 22 Q. What names do you recall, Mr. Mercer?
 23 A. I remember Healing Wolf and David Singing
 24 Bear and then James Ray and -- well, the Agave
 25 group. But I don't know who was the one that was

1 in charge of that.
 2 And then there was another guy that had a
 3 real Indian name. I can't remember him. But I did
 4 his sweat lodge too.
 5 Kerrie Dancing Butterfly. She did a
 6 couple of them there. And then there was a few
 7 more facilitators that had sweat lodges, but I
 8 don't know their names. Because I wasn't really
 9 directly involved with taking care of them
 10 personally. I was doing other things, setting
 11 things up.
 12 Q. So let's talk about just generally, then,
 13 for this ceremony, once you've heated the rocks,
 14 how does the ceremony begin?
 15 A. Well, we -- the whole thing is a
 16 ceremony. Just putting the sweat lodge together --
 17 the beginning of the ceremony is when we put the
 18 blankets on. And before we even enter the space
 19 with the blankets or anything, we sage ourselves
 20 with a stick a sage, Burn that sage ourselves. And
 21 then we sage the whole area of the sweat lodge.
 22 Then we put the blankets on and get
 23 going. And then the day of the sweat lodge, two
 24 hours before we start -- the sweat lodge starts,
 25 approximately two hours, we get the rocks burning.

1 We get them nice and hot.
 2 Before we do that, we actually give an
 3 offering to the rocks of tobacco and sage. Put
 4 that on the rocks before we start the fire.
 5 And then while the fire is burning -- you
 6 know -- we just kind of sit around. We get the
 7 water ready. And we set up the chairs. And
 8 sometimes we put up a tarp sometimes for people
 9 because they want to get out of the sun.
 10 Heat up the rocks. And then the people
 11 come for the sweat lodge. And before they can
 12 enter, every one of them gets saged before they
 13 enter the sacred space of the sweat lodge area.
 14 Q. What would you describe that space to be?
 15 We know that there is a sweat lodge. Let me put up
 16 Exhibit 145.
 17 Tell the jury where the sacred space is
 18 that you've just testified about.
 19 A. Well, that whole area is a sacred space.
 20 Like, right on the other side of these rocks is the
 21 other side. There is, like, a circle of rocks
 22 around the whole thing. Where the wood is kept and
 23 where the fire is, it starts about here -- you
 24 know -- and it works it's way in. About 50 feet on
 25 the other side of the sweat lodge is the end of it.

1 Q. And you just talked about participants
2 getting saged before they can enter that space?
3 A. Yes.
4 Q. First of all, what is sage?
5 A. Sage is a bush that grows in mostly
6 California that we get our sage from. And they let
7 it dry. They tie it together, and we burn it. And
8 it's a symbolic thing to help clear any negative
9 energy and bring good energy to the space.
10 Q. And for the participants to get saged,
11 where do they go?
12 A. They -- they come right up on the
13 left-hand side of this picture here. And there is
14 a little opening in the rocks where it's like a
15 little doorway. So they stand right in front of
16 that with their arms open. You just run the sage
17 smoke around them.
18 Q. Who is it that runs the sage smoke around
19 them before they can enter the space?
20 A. It depends on the group -- you know.
21 Sometimes it was me, and sometimes it was my wife.
22 Then with the James Ray group, it was
23 usually one of his Dream Team or the people working
24 with him. And then other times there are other
25 people doing it too.

1 Q. After -- we're just speaking about your
2 experience assisting with sweat lodges at Angel
3 Valley.
4 A. Uh-huh.
5 Q. Which, by the way, have you ever done any
6 other sweat lodge assistance work anywhere else?
7 A. No.
8 Q. So with regard to your experience, what
9 happens, then, after participants are saged?
10 A. Well, they usually come into the area of
11 the sweat lodge. And they use the chairs, and lot
12 of them get undressed and get ready for the sweat
13 lodge.
14 And then they -- we have a little fire
15 usually on the outside of the sacred area where we
16 have a little fire where sometimes they write their
17 intentions down on a piece of paper, and then they
18 burn those things so the smoke sets their
19 intentions into motion. And then after that, they
20 usually enter the sweat lodge.
21 Q. And as the participants enter the sweat
22 lodge, what do you do?
23 A. I just kind of hang out and make sure the
24 fire is burning correctly and that we've got water
25 and everything is ready for the participants.

1 Q. Before the participants enter the sweat
2 lodge, have any heated rocks been put in there yet?
3 A. No.
4 Q. So once all the participants are inside,
5 what happens next?
6 A. They get inside, and the person who is
7 running the sweat lodge will ask us to bring in so
8 many rocks.
9 Q. How does that happen?
10 A. I guess what happens is they talk a
11 little bit to the people inside. And then they say
12 bring us -- you know -- eight "grandfathers."
13 Q. When you say "they," who specifically do
14 you mean?
15 A. Well, the person that's in the sweat
16 lodge that's running the sweat lodge. So the
17 pourer is the one that's in charge. He says -- you
18 know -- bring me so many rocks.
19 So then I go into the fire. There is a
20 couple of us that get the rocks out, take them out
21 of the fire. Then we take them over here to this
22 little rock right there and place the pitchfork and
23 the rock right on that rock, and then there is
24 somebody that brushes it off. Gets all the soot
25 and stuff off of it.

1 And then we take it to the sweat lodge.
2 As the door is opened, and we slide the pitchfork
3 in with the rock. And we say, "Aho Mitakuye
4 Oyasin." That is part of the ceremony. And
5 everyone in the sweat lodge says that. That's
6 welcoming the grandfathers into the sweat lodge.
7 Then someone else takes the stick from
8 there and puts it into the hole and then passes the
9 pitchfork or the shovel back out.
10 Q. When that process begins and the pourer
11 calls out for the number of rocks, is the door
12 opened or closed?
13 A. It's open.
14 Q. And you used the term "grandfather."
15 What does that refer to?
16 A. Well, we call the lava rocks grandfathers
17 because -- you know -- the lava rock is the
18 original rock that was come out of the volcanoes.
19 So they're the oldest rocks we have. We call them
20 "grandfathers."
21 Q. And that process of bringing in the
22 number of rocks that the pourer has asked for -- do
23 you do all the rocks at once or one at a time?
24 A. One at a time.
25 Q. Who is it that decides the number of

1 rocks that will be brought in for the ceremony?

2 **A. The pourer.**

3 **Q.** We've heard about water. How does the
4 water get in the sweat lodge?

5 **A. Well, you see there is these five-gallon**
6 **buckets right here? We fill those up, and we just**
7 **hand them to the person that's running the sweat**
8 **lodge. And that person is usually just inside the**
9 **door just to the right.**

10 **So -- you know -- I mean, that's the**
11 **first person you see when the door opens.**

12 **Q.** When do you fill up those buckets of
13 water.

14 **A. Those -- you know -- during the sweat**
15 **lodge while it was going on. But before it even**
16 **started, there is two of them full of water.**

17 **Q.** And where does that water come from?

18 **A. The well from the spigot behind the sweat**
19 **lodge there.**

20 **Q.** Once the -- when is it that the water
21 goes in?

22 **A. Excuse me?**

23 **Q.** How is it determined when the water will
24 go into the sweat lodge, when that bucket of water
25 will go in?

1 **A. When he asks for it. The pourer asks for**
2 **it.**

3 **Q.** Does the pourer typically ask every round
4 for the water bucket?

5 **A. Sometimes they do. It depends on the**
6 **sweat lodge. You know, every sweat lodge is a**
7 **little different. Some people use less water and**
8 **some people use more water.**

9 **Q.** Once the bucket of water has gone in, how
10 does that bucket go out?

11 **A. When it's empty, they just pass it out**
12 **and want another one.**

13 **Q.** Okay. Once the ceremony has commenced,
14 the pourer has asked for the number of
15 grandfathers, or rocks, that he wants for the first
16 round, what happens?

17 **A. We get to the fire and I open -- you**
18 **know -- open it up so I can get to the rocks. And**
19 **we scoop them up with a shovel or a pitchfork, and**
20 **we take them to the rock and brush them off and**
21 **hand them into the sweat lodge.**

22 **Q.** If the -- I want to get a sense of how
23 long it takes to get the rocks inside the sweat
24 lodge. How long would it take to get one rock --
25 typically take to get one rock inside the sweat

1 lodge?

2 **A. Well, the first rock usually takes a lot**
3 **longer because you have to get into the fire.**
4 **But -- you know -- just a minute or so. It doesn't**
5 **take long to get them in there because you just got**
6 **to scoop them out and brush them off. You want to**
7 **get them in there as quickly as possible so they**
8 **don't cool off.**

9 **Q.** And once all of the rocks for that round
10 are in place, who closes the door to the sweat
11 lodge?

12 **A. Well, the pourer tells us when to close**
13 **it, when to open. He's in control of everything.**
14 **And we just -- so he tells us -- you know --**
15 **they're in there. Shut the door. And then so**
16 **whoever is in front of door shuts the door.**

17 **Q.** And once that person who is in front of
18 the door shuts the door, where does that person go?

19 **A. They stay right there, right in front of**
20 **door.**

21 **Q.** In your experience, Mr. Mercer, what is
22 it that determines how hot a sweat lodge will get?

23 **A. It's determined by how many rocks go into**
24 **it.**

25 **Q.** And, in your experience, can the

1 rocks be -- are the rocks always uniformly hot?

2 **A. Oh, no. It depends upon the fire. When**
3 **I first started doing it, I wasn't -- I wasn't the**
4 **best at keeping the rocks really, really, really**
5 **hot. So as I got more experience, I got hotter and**
6 **hotter rocks.**

7 **Q.** And if the rocks are hotter and hotter,
8 then how is it determined how hot the sweat lodge
9 will be?

10 **A. It's all up to the pourer; whoever is**
11 **inside that asks for the rocks.**

12 **Q.** For the ceremony, who is it that
13 determines how long each round will be?

14 **A. That's the pourer also.**

15 **Q.** And who is it who determines how many
16 rounds there will be?

17 **A. That's the pourer.**

18 **Q.** Who is it that determines how long the
19 door will be open between each round?

20 **A. The pourer.**

21 **Q.** And who is it that determines when the
22 sweat lodge ceremony will end?

23 **A. That's the pourer.**

24 **Q.** You told us that you don't use the same
25 rocks twice?

1 **A. No.**
 2 **Q.** Why is that?
 3 **A. Because once they're used, energetically**
 4 **you don't want to use the same rocks again. I**
 5 **mean, they're fine. Some of them are cracked. But**
 6 **energetically you just want to put those aside**
 7 **because they've been heated up. They've been used**
 8 **in a ceremony. So we don't want to use them**
 9 **again -- you know. So we just put them aside.**
 10 **Q.** Now, I'd like to ask you specifically
 11 about the ceremony in 2007 conducted by Mr. Ray
 12 that you have testified you assisted.
 13 First of all, tell the jury what your
 14 role was for that. It was your first sweat lodge
 15 ceremony?
 16 **A. That's correct.**
 17 **Q.** And it was conducted by whom?
 18 **A. By James Ray.**
 19 **Q.** And what was your role?
 20 **A. I was helping with the -- keeping the**
 21 **fire. So Gary Palisch was the fire keeper**
 22 **officially. So he stayed by the door. So I was**
 23 **the one that heated up the rocks and got them out**
 24 **of the fire and took them up to the door.**
 25 **Q.** And who else was assisting on the outside

1 for that ceremony?
 2 **A. My wife was there and another gentleman**
 3 **named Rotillo.**
 4 **Q.** Okay. Do you recall how large of a group
 5 it was that Mr. Ray was conducting the ceremony
 6 for?
 7 **A. It was rather large. I remember that.**
 8 **But I couldn't remember the number of people. I'm**
 9 **sure there was over 40.**
 10 **Q.** Do you recall whether there were members
 11 or people associated with Mr. Ray who were outside
 12 the sweat lodge?
 13 **A. Yes.**
 14 **Q.** Do you recall how many?
 15 **A. Three or four.**
 16 **Q.** And this is a yes no question. First of
 17 all, after the first round, was your attention
 18 drawn to anybody in particular?
 19 **A. Well, after the first --**
 20 **Q.** This is a yes or no question.
 21 **A. Yes.**
 22 **Q.** And specifically was it drawn to a
 23 person? Yes or no?
 24 **A. Well, it's not really yes or no.**
 25 **Q.** Okay. That's fine. And I'll ask you

1 another question. After the second round, was your
 2 attention drawn to a specific person?
 3 **A. Well, yes. As a matter of fact.**
 4 **Q.** And that's just a yes or no.
 5 **A. Okay.**
 6 **Q.** After the third round, was your attention
 7 drawn to additional people?
 8 **A. Yes.**
 9 **Q.** And this is a yes or no question. At
 10 some point did you become aware that there was a
 11 person who appeared to be in distress?
 12 **MR. LI: Objection, Your Honor. Foundation,**
 13 **leading the witness.**
 14 **THE COURT: Sustained.**
 15 **Q.** BY MS. POLK: With regard to the people
 16 who drew your attention, did you observe -- this is
 17 yes or no. Did you observe somebody that concerned
 18 you?
 19 **A. Yes.**
 20 **MR. LI: Objection. Relevance.**
 21 **THE COURT: Overruled.**
 22 **Answer stands.**
 23 **THE WITNESS: Yes.**
 24 **Q.** BY MS. POLK: And specifically about that
 25 person, limiting your answer to what you personally

1 observed about that person, tell the jury what you
 2 observed that drew your attention.
 3 **A. Well, in particular, there was this one**
 4 **lady that came out of sweat lodge who was -- she**
 5 **was a tall lady but not -- she wasn't large. But**
 6 **she was big enough. And she came out and her eyes**
 7 **were rolling into the back of her head. And as she**
 8 **hit the fresh air from being in the sweat lodge,**
 9 **she passed out and her face went into the dirt, and**
 10 **she scraped up her whole face. It was bloody,**
 11 **bleeding a little bit.**
 12 **Q.** Let me stop you. You just used the words
 13 that "she passed out." What did you specifically
 14 observe about her that made you say that?
 15 **A. Well, she crawled to the door, and by the**
 16 **time she got to the door, that's when I saw her**
 17 **eyes roll back. And then she -- her face went**
 18 **straight into the dirt.**
 19 **Q.** Did you do something with regard to that
 20 lady? Yes or no?
 21 **A. Yes.**
 22 **Q.** And specifically what did you do?
 23 **A. I helped drag her out of the doorway so**
 24 **other people could get out too. And we put her on**
 25 **the tarps.**

1 Q. And once you put that lady on the tarp,
2 did you continue to personally observe her?
3 A. **No, I didn't. I went back to the door.**
4 Q. You mentioned that your wife was there as
5 well?
6 A. **Yes.**
7 Q. This is yes or no question. Do you know
8 what your wife did after that with respect to that
9 lady?
10 A. **I'm not sure.**
11 Q. Did you observe that lady again
12 throughout the ceremony in 2007? Yes or no?
13 A. **Yes.**
14 Q. When did you observe her again?
15 A. **While she was sitting outside of the**
16 **sweat lodge.**
17 Q. And specifically what did you observe,
18 testifying about what you saw, not your
19 conclusions, but what you specifically saw this
20 lady?
21 A. **Well, at first we saw her laying there on**
22 **the tarps and getting cooled off and getting her**
23 **energy back so she could sit up. And after a while**
24 **I saw her sitting up in a chair and talking and**
25 **looking much better than she did before.**

1 Q. Did you observe -- this is yes or no --
2 whether that lady went back into the sweat lodge?
3 I should say yes, no, or you can say I don't know.
4 A. **I don't think she went back in. But I**
5 **don't really remember.**
6 Q. This is a yes or no question. Was your
7 attention drawn to another person during the 2007
8 ceremony conducted by Mr. Ray? Yes or no?
9 A. **Yes.**
10 Q. And specifically with regard to that
11 additional person, do you recall around what round
12 it was?
13 A. **Well --**
14 Q. Yes or no? Do you recall? And if you
15 don't --
16 A. **Yes and no.**
17 Q. Okay.
18 A. **I mean, yeah. Yes, I do.**
19 Q. And generally around what round was it
20 that you -- your attention was drawn to a second
21 person?
22 A. **On the third round. Second, third round.**
23 Q. And with respect to that second person,
24 how did you first become aware of that person?
25 A. **Well, see this is tough to answer**

1 **because --**
2 Q. And let me stop you. I want you to only
3 talk about what you personally saw and not talk
4 about conclusions --
5 A. **I understand.**
6 Q. -- or opinions. But what you saw in that
7 person.
8 A. **What I saw -- it isn't just one person,**
9 **though.**
10 Q. And you can talk about additional people
11 in a few moments. But I just want you to talk
12 about a second person specifically that you recall.
13 A. **You know, that's just it. I don't --**
14 **there is so many people --**
15 Q. Let me stop you there. Did you assist
16 people come out of the sweat lodge?
17 A. **Yes.**
18 MR. LI: Your Honor, objection. Move to
19 strike all the testimony. So many people. There
20 is no question.
21 THE COURT: That response will be stricken and
22 the last response as well.
23 Continue, please, Ms. Polk.
24 Q. BY MS. POLK: Your answer to the question
25 that you assisted somebody -- you answered yes to

1 the question you assisted somebody to come out of
2 the sweat lodge. Yes or no?
3 A. **Yes.**
4 Q. Did you assist more than one person come
5 out of the sweat lodge?
6 A. **Yes.**
7 Q. Do you know how many approximately you
8 assisted? Yes or no?
9 A. **Yes.**
10 Q. And approximately how many did you
11 assist?
12 A. **Probably 10.**
13 Q. And for the first person that you
14 assisted, what did you do to assist them to come
15 out of the sweat lodge? Just talking about that
16 first person.
17 A. **We cannot enter the sweat lodge. So when**
18 **they get to the door, we just grab their arms and**
19 **pull them over to the tarps.**
20 Q. And with regard to the first person that
21 you have in mind that you assisted to come from the
22 door to the tarps, what did you assist them
23 specifically to do?
24 A. **I just dragged them. Just got them out**
25 **of the way. They come to the door, and there is**

1 **other people behind them. It's -- you just got to**
 2 **move them. You just got to get them out of the way**
 3 **so you can make room for the next person.**

4 **Q.** And thinking specifically about the
 5 person you moved out of the way, without your
 6 assistance -- this is yes or no. Without your
 7 assistance, was that person able to get out of the
 8 way on their own?

9 **MR. LI:** Objection.

10 **THE COURT:** Sustained.

11 **MR. LI:** I would ask that the witness wait for
 12 the objection before he answers.

13 **THE COURT:** If you would, please, Mr. Mercer,
 14 wait until the question is asked and if there is an
 15 objection. Please listen carefully.

16 The last answer is stricken.

17 Please continue, Ms. Polk.

18 **Q.** BY MS. POLK: With respect to -- I just
 19 want you to think about the first person that you
 20 assisted to get from the doorway to the tarp, just
 21 about that person, what about that person -- what
 22 did you personally observe about that person that
 23 made you assist them? Just talk about that one
 24 person.

25 **A.** **Okay. When her eyes rolled in the back**

1 **of her head --**

2 **Q.** I'm sorry. I didn't want you to talk
 3 about that person.

4 **A.** **The next person?**

5 **Q.** The second person you assisted go from
 6 the door to the tarp -- and listen to my question.
 7 Only talking about that second person, what did you
 8 personally observe that made you go over and assist
 9 that person from the door to the tarp?

10 **MR. LI:** Objection. Vague and ambiguous, form
 11 of the question.

12 **THE COURT:** Overruled.

13 You may answer.

14 **MR. LI:** Your Honor, if I may approach?

15 **THE COURT:** You may answer that question.

16 **THE WITNESS:** When he was crawling up to the
 17 door, he got to the edge of the door and collapsed
 18 and was laying there in the dirt. And his face was
 19 in the dirt. So what we did just grabbed him and
 20 we pulled him out.

21 **Q.** BY MS. POLK: Thank you. With respect to
 22 that ceremony in 2007 -- this is a yes or no
 23 question -- do you recall by the final round
 24 approximately how many people -- approximately what
 25 percentage of the participants were outside?

1 That's a yes or no.

2 **A.** **Yes.**

3 **Q.** Then tell us approximately what
 4 percentage of the participants were outside by the
 5 last round.

6 **A.** **It was close to 50 percent.**

7 **Q.** Let's move on to 2008. And I want to
 8 talk specifically about the ceremony conducted by
 9 Mr. Ray in 2008. Do you recall -- I know you
 10 testified about it already. That's when you
 11 constructed the new kiva?

12 **A.** **That's correct.**

13 **Q.** Do you recall the month that Mr. Ray
 14 conducted his ceremony in 2008?

15 **A.** **I believe it was in September, October.**
 16 **You know, I'm not sure. I know it was later in the**
 17 **year.**

18 **Q.** Do you recall who was the first group to
 19 conduct a ceremony in the new kiva in 2008?

20 **A.** **I believe it was the Agave group.**

21 **Q.** Could you be wrong on that?

22 **A.** **Yeah. These things all run together for**
 23 **me. It's been a while. So it's hard for me to**
 24 **remember exactly the order of everything.**

25 **Q.** I understand. In 2008 were you present

1 then when Mr. Ray conducted his sweat lodge
 2 ceremony?

3 **A.** **Yes, I was.**

4 **Q.** And tell the jury what your role was.

5 **A.** **I was assisting the fire keeper again.**

6 **Q.** Who was the main fire keeper?

7 **A.** **Gary Palisch.**

8 **Q.** And who else was present assisting Gary
 9 Palisch?

10 **A.** **Debra Mercer, and my wife was, and girl**
 11 **named Anita. I can't remember her last name. And**
 12 **then my daughter, I think, was there too.**

13 **Q.** Do you recall approximately how many
 14 participants there were for Mr. Ray's 2008
 15 ceremony?

16 **A.** **I think that one was a lot bigger because**
 17 **we had to build it bigger for them. I'm thinking**
 18 **about a little over 60 people.**

19 **Q.** Do you recall whether or not Mr. Ray had
 20 any members from his staff outside the sweat lodge
 21 during the ceremony?

22 **A.** **Yes, he did.**

23 **Q.** Do you recall approximately how many?

24 **A.** **Three or four again that time.**

25 **Q.** And you have testified about tarps. And

1 in the photograph that we have up on the overhead,
2 which is Exhibit 145, we can see some tarps on the
3 ground. Do you recall, Mr. Mercer, when it was
4 that tarps began to be used on the outside of the
5 sweat lodge? That's yes or no, if you recall.

6 **A. Yes.**

7 **Q.** And when do you recall those tarps first
8 being used?

9 **A. It was after the last sweat lodge we had**
10 **them out there. So the one in '09. I don't think**
11 **we used it in 08.**

12 **Q.** And your testimony, then, about 2007
13 and --

14 **A. You know -- yeah. Yeah. That's right.**
15 **I don't think we used them on the ground until '09.**

16 **Q.** When you testified a few moments ago
17 about 2007, I believe I heard you say you dragged
18 people to the tarps.

19 **A. Well, that was incorrect because there**
20 **was no tarps. That's one of the reasons we started**
21 **using tarps is because we dragged these people out.**

22 **Q.** Let me stop you right there.

23 **A. Okay. I'm sorry.**

24 **Q.** You started using tarps for the first
25 time in what year?

1 **A. You know, I believe it was 2009. But I**
2 **don't remember.**

3 **Q.** So in 2008, Mr. Ray's sweat lodge
4 ceremony in 2008, you were the assistant fire
5 keeper. The process that you described for the
6 ceremony itself is that your preparation, heating
7 up the rocks, getting the water -- is that all the
8 same for each sweat lodge ceremony?

9 **A. Yeah.**

10 **Q.** Did the saging ceremony occur in 2008 for
11 Mr. Ray's sweat lodge ceremony as well?

12 **A. Yes.**

13 **Q.** And this is a yes or no question. Was
14 your attention -- this is now for the 2008
15 Mr. Ray's sweat lodge ceremony. Yes or no. Was
16 your attention drawn to a specific person after the
17 first round?

18 MR. LI: Objection, Your Honor. Leading.

19 THE COURT: Overruled.

20 You may answer that.

21 **Q.** BY MS. POLK: Yes or no?

22 **A. Yes and no.**

23 **Q.** And was your attention drawn specifically
24 to a person after the second round?

25 MR. LI: Objection. Leading.

1 THE COURT: Overruled.

2 **Q.** BY MS. POLK: Yes or no. If you can't
3 answer a question, just tell me you can't answer it
4 the way I'm asking.

5 **A. I can't answer that one.**

6 **Q.** At some point during the ceremony
7 in 2008, was your attention drawn to a specific
8 individual?

9 **A. At different times, yes.**

10 **Q.** And I want to have you just testify about
11 the first person that your attention was drawn to.
12 Let me ask you a question. Limiting your answer to
13 specifically what you personally observed about
14 that person, tell the jury what you observed that
15 drew your attention.

16 **A. Well, there was one young lady that came**
17 **out of the sweat lodge. All of her muscles were**
18 **in -- they were, like, cramping. Her whole body**
19 **was cramping. She couldn't get it undone, and we**
20 **gave her some water --**

21 MR. LI: Objection. Move to strike.

22 Speculation what she could or couldn't do.

23 THE COURT: The last part have to be strictly
24 602, 701 information --

25 **Q.** BY MS. POLK: And Let me ask you another

1 question --

2 THE COURT: Sustained. And it is ordered
3 stricken.

4 **Q.** BY MS. POLK: With respect to this lady,
5 do you recall around what round it was?

6 **A. I think it was by the end of the sweat**
7 **lodge.**

8 **Q.** And do you recall where you were when you
9 became aware of her?

10 **A. I was standing by the door, I would**
11 **think.**

12 **Q.** Did you ever go over to her?

13 **A. Yes, I did.**

14 **Q.** And without explaining why something
15 might have been happening, I just want you to tell
16 the jury what you saw. So you were talking about
17 cramping.

18 **A. I saw her cramping. Her arms were like**
19 **this, and her legs were all cramped up, and she was**
20 **in the fetal position. And that's what I saw.**

21 **Q.** And let me ask you the next question.
22 How long did that cramping -- did you observe how
23 long that cramping lasted for?

24 **A. Well, yes. We were -- we were trying to**
25 **get her to the showers, I guess. There --**

1 Q. Let me stop you. Just try to answer my
2 question.

3 Did you observe for what period of time
4 she remained in what you've described as a fetal
5 position?

6 A. **About 30 to 45 minutes.**

7 Q. And during that time period, did you
8 observe any changes? Yes or no --

9 A. **No.**

10 Q. Did you observe any changes?

11 A. **No, I did not.**

12 Q. And this is a yes or no. Did somebody
13 else other than you then tend to this lady?

14 A. **Yes.**

15 Q. This is a yes or no question. Did you
16 assist other individuals leave that ceremony? Did
17 you assist them move from the door to some place
18 out in the area? Yes or no?

19 MR. LI: Objection. Leading.

20 THE WITNESS: Yes.

21 THE COURT: Overruled. The answer stands.

22 Q. BY MS. POLK: Do you recall how many
23 people -- this is yes or no -- do you recall how
24 many people you assisted?

25 A. **No. I can't recall specifically.**

1 Q. Can you recall whether you assisted more
2 than one individual?

3 A. **Yes.**

4 Q. Do you recall whether you assisted more
5 than five individuals?

6 A. **Yes.**

7 Q. Do you recall whether you assisted more
8 than 10 individuals?

9 A. **Yes.**

10 Q. Did you have -- this is yes or no -- any
11 personal contact with any of those individuals that
12 you assisted? Yes or no?

13 A. **No.**

14 Q. With respect to -- I want to go back to
15 the 2007 sweat lodge ceremony conducted by Mr. Ray.
16 Did you observe anybody use water to cool off
17 participants? Yes or no?

18 A. **Yes.**

19 Q. Who was it in 2007, if you know, was
20 cooling off individuals?

21 A. **One of the James Ray team members.**

22 Q. What was used to cool off participants
23 who came out?

24 A. **A hose, water and a hose.**

25 Q. Can you show us on this picture where the

1 hose spigot is.

2 A. **You can't see it from here. But it's**
3 **approximately right here about a hundred yards from**
4 **behind the sweat lodge. Maybe 50 yards.**

5 Q. And how many hoses did you have running
6 in 2007, if you recall?

7 A. **We had two of them. Two linked together**
8 **so it could reach all the way to this side of the**
9 **sweat lodge.**

10 Q. And for 2008, did you have that same
11 arrangement for the hose?

12 A. **Yes.**

13 Q. I want to talk about the 2009 sweat lodge
14 ceremony conducted by Mr. Ray.

15 A. **Okay.**

16 Q. You were present in October of 2009?

17 A. **Yes.**

18 Q. What was your role for that ceremony?

19 A. **I was the fire keeper for that one.**

20 Q. Who else assisted?

21 A. **My wife, Debbie; a gentleman, Rotillo,**
22 **and my daughter, Sarah.**

23 Q. When was it that you agreed to do the
24 ceremony for Mr. Ray for October of 2009?

25 A. **It was about three weeks or so before the**

1 **sweat lodge.**

2 Q. And you testified this morning that
3 by 2009 you were no longer working for Angel
4 Valley; is that correct?

5 A. **That's correct.**

6 Q. Who asked you to do the ceremony in
7 October of 2009?

8 A. **Michael Hamilton.**

9 Q. And you testified this morning that you
10 also did a ceremony for another group in May
11 of 2009?

12 A. **Yes.**

13 Q. Who asked you to do that ceremony?

14 A. **Well, it was set up by Gary Palisch. And**
15 **so I -- it was between him -- he wasn't there**
16 **anymore. So it would have to be Michael.**

17 Q. Were you paid, Mr. Mercer, to assist with
18 the October 2009 sweat lodge?

19 A. **As far as tips go, I got tips as an**
20 **assistant.**

21 Q. Did the Hamiltons pay you?

22 A. **No. They did -- well, no, they didn't.**

23 Q. You don't recall getting paid?

24 A. **Not for the first one, I didn't.**

25 Q. The May one?

1 **A. Yeah.**
 2 **Q.** And how about for the October one?
 3 **A. Yes.**
 4 **Q.** Do you recall how -- who paid you for the
 5 October event?
 6 **A. Gary did.**
 7 **Q.** Do you recall how much you were paid?
 8 **A. I can't remember. No.**
 9 **Q.** You just mentioned tips. Where would
 10 tips come from?
 11 **A. The tips come from the participants that**
 12 **go into the sweat lodge. They -- traditionally**
 13 **they bring an offering to the fire keeper. And not**
 14 **always is it money. It could be -- you know --**
 15 **anything. I was given a pouch one time. But they**
 16 **bring an offering, so that in his group they**
 17 **brought money.**
 18 **Q.** "His group" being who?
 19 **A. James Ray. And other groups did too.**
 20 **Q.** Okay. So let's talk about the sweat
 21 lodge ceremony in October of 2009. Do you recall,
 22 first of all, the day being Thursday, October 8?
 23 **A. No.**
 24 **Q.** And we're looking now at a photograph on
 25 the overhead of the sweat lodge for October 2009.

1 Do you recall when it was that you
 2 started the fire to heat the rocks?
 3 **A. I started around 2:00 o'clock.**
 4 **Q.** Do you recall what time the ceremony was
 5 supposed to begin?
 6 **A. It was around 4:00.**
 7 **Q.** You think --
 8 **A. That was the scheduled time. But nobody**
 9 **really got in there until around 5:00 or so,**
 10 **because I remember the fire was burning for at**
 11 **least three hours before.**
 12 **Q.** I want to review those times with you and
 13 get you to think about those times again.
 14 MR. LI: Objection. Leading.
 15 **Q.** BY MS. POLK: We're talking about 2009.
 16 MR. LI: Objection. Leading. The witness has
 17 answered.
 18 THE COURT: Sustained as to form.
 19 Go ahead and continue with the question,
 20 please, Ms. Polk.
 21 **Q.** BY MS. POLK: My question is about
 22 the 2009 sweat lodge ceremony. Do you remember
 23 about what time it ended?
 24 **A. Well, it was getting dark. I would say**
 25 **it was 5:00, 6:00 o'clock.**

1 **Q.** And then working your way backwards, do
 2 you recall if the ceremony was in the afternoon or
 3 the evening?
 4 **A. Well, it started in the afternoon and**
 5 **went into the evening.**
 6 **Q.** How many hours before the ceremony began
 7 did you start heating the rocks?
 8 **A. Well, two hours.**
 9 **Q.** Would you tell the jury what wood you
 10 used to heat the rocks for Mr. Ray's 2009 sweat
 11 lodge ceremony.
 12 **A. I used the wood that was provided to us**
 13 **from Angel Valley. It was stacked right up there.**
 14 **It was the wood -- I assume it was the wood that**
 15 **came from the construction site.**
 16 **Q.** And for the 2008 ceremony that you just
 17 testified about, what wood did you use?
 18 **A. We used some of that construction wood**
 19 **and some natural wood.**
 20 **Q.** And, if you recall, for the 2007 ceremony
 21 conducted by Mr. Ray, do you recall what wood you
 22 used?
 23 **A. That was all natural.**
 24 **Q.** By "natural," what do you mean?
 25 **A. Just downed trees by the creek that we**

1 **would get. And we'd cut them up and bring them**
 2 **over to the sweat lodge.**
 3 **Q.** Who collected the rocks for the 2009
 4 ceremony?
 5 **A. Rotillo.**
 6 **Q.** What kind of rocks were they?
 7 **A. Lava rocks.**
 8 **Q.** In preparing the rocks and in heating the
 9 rocks, do you add anything to the fire?
 10 **A. No. Just before we start the fire, we**
 11 **add a pinch of tobacco and a pinch of sage for an**
 12 **offering.**
 13 **Q.** Do you recall approximately how many
 14 participants Mr. Ray had for his 2009 sweat lodge?
 15 **A. I don't know the specific amount. There**
 16 **was over 50 of them.**
 17 **Q.** Did you have a conversation with Mr. Ray
 18 before Mr. Ray and the participants went in the
 19 sweat lodge?
 20 **A. I let him know that this was the hottest**
 21 **fire I've ever had and the rocks were really hot.**
 22 **Q.** When did that conversation occur?
 23 **A. Just before they burned their intention**
 24 **papers on another fire. So it was after they got**
 25 **saged. So they were in the sacred space by then.**

1 Q. How did you -- where did you find Mr. Ray
2 to have the conversation with him?

3 A. He was --- he was standing inside the
4 sweat lodge, I think, or inside the sweat area, and
5 I just walked up to him.

6 Q. Tell the jury what you told him.

7 A. I told him that these are the hottest
8 rocks ever that I've ever had and the most intense
9 fire that I've ever had.

10 Q. Did Mr. Ray respond to you?

11 A. Yeah. He said, good. And then he
12 brought me into the another circle where all the
13 people were standing around to -- before they
14 burned their intention papers, and he had me tell
15 them the same thing.

16 Q. Do you recall what you told the
17 participants?

18 A. I told them that this is the hottest fire
19 and the hottest rocks we've ever had.

20 Q. Do you recall whether Mr. Ray said
21 anything to the participants then about what you
22 had just said?

23 A. Yeah. I can't recall.

24 Q. For the 2009 ceremony where were you for
25 most of the ceremony?

1 A. Well, you see I'm standing here. And in
2 between here and all around the fire and back where
3 the firewood is, pretty much I would take care of
4 that whole area right there. I was mostly watching
5 the fire.

6 Q. Do you recall where your wife, Debbie,
7 was?

8 A. Yes. She was at the door.

9 Q. Do you see Debbie in this picture?

10 A. Yes. She's right here at the door.

11 Q. Was Sarah there -- your daughter?

12 A. Yes. She was there. But I don't see her
13 in this picture.

14 Q. Do you recall what Sarah was doing during
15 the ceremony?

16 A. Mostly she was helping us brush the rocks
17 off and there for support.

18 Q. Why do you brush those rocks off?

19 A. Because we don't want to bring anything
20 attached to the rocks in there. We want to make
21 sure it's nice and clean and it's just a hot rock
22 so there isn't any smoke or anything that come out
23 of it.

24 Q. How do you brush them off?

25 A. With a whisk broom.

1 Q. Once the sweat lodge ceremony began by
2 Mr. Ray, do you recall how many rocks were called
3 for for the first round?

4 A. No.

5 Q. Do you recall, Mr. Mercer, how many rocks
6 were called for by Mr. Ray for any of the rounds?

7 A. I remember one round that he only asked
8 for four rocks.

9 Q. Do you recall what round that was?

10 A. No. It was -- I can't say specifically,
11 but it was in the four or five round area.

12 Q. Do you recall how many rounds Mr. Ray
13 held?

14 A. There was eight of them.

15 Q. Do you recall -- do you recall if Mr. Ray
16 called for rocks before his final rounds?

17 A. Yes.

18 Q. Do you recall how many?

19 A. No.

20 Q. Do you recall how many rocks were
21 gathered before the ceremony began in preparation
22 for the ceremony?

23 A. There was a hundred rocks.

24 Q. And do you know personally how many rocks
25 Mr. Ray used for his ceremony? Yes or no.

1 A. No.

2 Q. Do you know where Mr. Ray sat for
3 the 2009 ceremony inside the sweat lodge?

4 A. Yes.

5 Q. Can you show the jury where.

6 A. Well, here's the door right where Debbie
7 is. The first person to the right is where he sat.

8 Q. Do you recall where Mr. Ray sat for
9 his 2008 ceremony?

10 A. It's the same spot.

11 Q. Do you recall where Mr. Ray sat for his
12 2007 ceremony?

13 A. The same spot.

14 Q. While the sweat lodge ceremony was going
15 on in 2009, were you able to hear voices from
16 inside?

17 A. Oh, sure.

18 Q. And generally what sorts of things did
19 you hear?

20 A. I heard people yelling out their
21 intentions. Their was some singing going on. You
22 could hear the pourer talking and explaining things
23 and doing the ceremony. It's rather loud
24 sometimes.

25 Q. And the pourer being Mr. Ray?

1 **A. Yes.**
 2 **Q.** Did you ever hear Mr. Ray talking to the
 3 participants?
 4 **A. Yes.**
 5 **Q.** Tell the jury what you heard.
 6 **A. I can't say specifically what I heard. I**
 7 **mean, I could hear him talking. But I didn't pay**
 8 **attention to what was going on inside the sweat**
 9 **lodge. I paid more attention to the fire.**
 10 **Q.** Okay. Did you become aware of -- after
 11 the first round of anybody leaving?
 12 **A. Yes.**
 13 **Q.** And did you become aware of participants
 14 leaving after the second round?
 15 **A. Yes.**
 16 **Q.** The same question for the third round.
 17 **A. Yes.**
 18 **Q.** At some point was your attention drawn to
 19 a specific person?
 20 **A. Yes.**
 21 **Q.** When was that?
 22 **A. Probably around the fourth round, fourth**
 23 **or fifth round.**
 24 **Q.** What drew your attention to that person?
 25 **A. A guy came out, and his whole arm was**

1 **burnt. It was burned really bad. And he had**
 2 **fallen into the hole of the -- where the hot rocks**
 3 **were.**
 4 **Q.** Do you recall what that man was saying?
 5 **A. No.**
 6 **Q.** Was he saying anything?
 7 **A. I'm sure he was saying something. I**
 8 **can't recall what he was saying.**
 9 **Q.** Did you pay attention to what happened to
 10 that man?
 11 **A. Yeah. For a while.**
 12 **Q.** What did you see happen to him?
 13 **A. We took him over to a place to sit down,**
 14 **and somebody was getting ice for him or butter or**
 15 **something like that. I don't know. Then Fawn came**
 16 **in and said, no. Not butter. Let's just put ice**
 17 **on it. So we put ice on his arm. And then I went**
 18 **back to the fire.**
 19 **Q.** Did you ever notice that man again that
 20 day?
 21 **A. Sure.**
 22 **Q.** When did you see him again?
 23 **A. I saw him while he was sitting there and**
 24 **talking a few times. And then at the end of the**
 25 **sweat lodge, he went back in.**

1 **Q.** Were you aware of when he went back in?
 2 **A. Yes. I was wondering why he was going**
 3 **back in.**
 4 **Q.** Did you notice anybody have any
 5 interaction with him about the time he went back
 6 in?
 7 **A. Yeah. There was people talking to him,**
 8 **interacting with him.**
 9 **Q.** Do you recall whether or not Mr. Ray said
 10 something to him?
 11 **A. Not that I can recall. No.**
 12 **Q.** Was your attention drawn to another
 13 person?
 14 **A. Yeah. There was another guy that was --**
 15 **he was yelling about having a heart attack and he**
 16 **didn't want to die. And he was getting rather**
 17 **loud. And yeah. I wasn't over him specifically.**
 18 **I was taking care of the fire. But he was**
 19 **screaming and yelling that he didn't want to die**
 20 **and that he was having a heart attack.**
 21 **Q.** Do you recall what round that was?
 22 **A. It was later in the sweat lodge. It was**
 23 **already getting dark.**
 24 **Q.** Did you hear Mr. Ray say anything to that
 25 it man?

1 **A. Yeah. I heard him yell out to him. I**
 2 **can't remember what he said exactly. But he**
 3 **said -- you know -- you're more than what's going**
 4 **on, and you'll be okay.**
 5 **Q.** Did you see what happened to the man
 6 after Mr. Ray told him he'd be okay?
 7 **A. Well, he was still laying over there with**
 8 **other people working on him. But other than that,**
 9 **no. I paid more attention to what the fire -- what**
 10 **my job was.**
 11 **Q.** Do you recall -- when Mr. Ray called out
 12 to this man, do you recall if the door to the sweat
 13 lodge was open or closed?
 14 **A. It was closed at that time. Because the**
 15 **sweat lodge was going on, and he was making a lot**
 16 **of noise. And Mr. Ray wanted to know what was**
 17 **going on out there.**
 18 **Q.** And how do you know that? Did he say
 19 that?
 20 **A. Yeah. He said, what's going on out**
 21 **there?**
 22 **Q.** Did somebody respond to Mr. Ray?
 23 **A. Yeah. One of his team members, I guess.**
 24 **Q.** And then what did you hear Mr. Ray say?
 25 **A. That -- that he's not going to die, and**

1 **he'll be fine, and everything is going to be okay.**

2 **Q.** Did you ever hear Mr. Ray address any of
3 the participants who had left the sweat lodge?

4 **A. Yeah. He -- he encouraged them to come**
5 **back in.**

6 **Q.** Do you recall what words he used to
7 encourage people to come back in?

8 **A. Something like the door is open and we're**
9 **going to start a new round. Does anybody want to**
10 **come back in?**

11 **Q.** With respect to the 2008 ceremony, did
12 you hear Mr. Ray address participants who had left
13 his sweat lodge?

14 **A. Yes.**

15 **Q.** And in 2008 what did you hear him say?

16 **A. Pretty much the same thing. The door is**
17 **open. If you want to come back in, you can.**

18 **Q.** Did you notice a difference between the
19 way Mr. Ray addressed participants in 2009 who left
20 and the way he addressed them in 2008?

21 MR. LI: Objection. Form of the question.
22 Speculation. Foundation.

23 THE COURT: That, again, called for yes or no.

24 You may answer that if you can.

25 THE WITNESS: Can you repeat the question?

1 **Q.** BY MS. POLK: Did you notice a difference
2 between the way in 2009 Mr. Ray addressed those who
3 had left between 2009 and the way he addressed them
4 in 2008?

5 **A. Yes.**

6 **Q.** And did you notice a difference between
7 the way Mr. Ray addressed those who had left
8 in 2009 and the way he'd addressed the 2007
9 participants who had left? Yes or no?

10 **A. Yes.**

11 **Q.** Was there a difference between 2007
12 and 2008 in the way Mr. Ray addressed those who had
13 left?

14 **A. No, not really.**

15 **Q.** Would you tell us what the difference,
16 then, between 2009 and 2008 was with respect to the
17 way Mr. Ray addressed those who had left?

18 **A. He just --**

19 MR. LI: Objection. Form of the question,
20 lack of foundation, speculation.

21 THE COURT: Overruled.

22 **Q.** BY MS. POLK: You can answer.

23 **A. He was louder. Louder and he seemed to**
24 **talk a bit -- a little bit more.**

25 **Q.** In 2009 -- this is a yes or no

1 question -- were you ever made aware of a safety
2 plan with regard to the participants?

3 MR. LI: Objection. Lack of foundation. Term
4 "safety plan" is vague and ambiguous, subject of a
5 lot of pretrial motions.

6 THE COURT: Sustained.

7 **Q.** BY MS. POLK: Were you ever informed
8 whether there was a nurse present in 2009?

9 **A. Yes.**

10 **Q.** Do you recall who informed you of that?
11 Yes or no?

12 **A. No. I can't.**

13 **Q.** Do you recall when it was you became
14 aware of that?

15 **A. The day of the sweat lodge.**

16 **Q.** Do you recall whether you became aware of
17 it before the sweat lodge began?

18 **A. Yeah. While we were getting the firewood**
19 **all together and getting stuff going.**

20 **Q.** Did you ever have a conversation before
21 the sweat lodge ceremony began with a person who
22 was identified to you as a nurse? Yes or no?

23 **A. Yeah. I did talk to her.**

24 **Q.** And specifically what did you talk about?

25 **A. The weather.**

1 **Q.** Did she ever discuss with you anything
2 pertaining to taking care of participants?

3 **A. No.**

4 **Q.** Mr. Mercer, by the final round of
5 Mr. Ray's 2009 ceremony, do you recall how many
6 participants were inside for the final round?

7 **A. There was still quite a few in there.**
8 **There was well over half.**

9 **Q.** Do you recall how that ceremony ended
10 in 2009?

11 **A. Yeah. Just like any other one -- you**
12 **know. He said that -- you know -- open the door,**
13 **and all the people came out, just like regular.**

14 **Q.** At some point were you aware of people in
15 distress?

16 **A. Yes.**

17 **Q.** And this is after it's over. What made
18 you became aware of people in distress?

19 **A. Well, in one particular case, my wife was**
20 **yelling. I could hear -- I was on the other side**
21 **of the sweat lodge by the door. I could hear her**
22 **yelling for help. She yelled for me. I can't**
23 **remember what she said.**

24 **But I went over to the other side of the**
25 **sweat lodge. And there was two people that her and**

1 **my daughter were pulling out. And --**
 2 **Q.** Was there an opening to the sweat lodge
 3 in the back?
 4 **A.** **Yeah. She opened it up herself.**
 5 **Q.** Before the ceremony started, was it open
 6 back there?
 7 **A.** **Oh, no.**
 8 **Q.** Were you aware when your wife opened it
 9 at the time?
 10 **A.** **No.**
 11 **Q.** How did you become aware, then, that she
 12 had opened the back?
 13 **A.** **When she yelled.**
 14 **Q.** And you ran over there?
 15 **A.** **Yeah.**
 16 **Q.** Tell the jury what you saw.
 17 **A.** **I saw two people laying just outside the**
 18 **sweat lodge. And then there was another guy still**
 19 **inside the sweat lodge. And I helped my daughter**
 20 **pull him out. And then I went over to the young**
 21 **lady that was laying there and the first two that**
 22 **my wife and daughter pulled out. And I started**
 23 **checking their vital signs.**
 24 **Q.** Mr. Mercer, I'm going to show you
 25 Exhibits 822, 823 and 827, which are photographs

1 taken the next day, on October 9th. I'm going to
 2 ask you generally what these are photographs are
 3 of.
 4 **A.** **The sweat lodge.**
 5 MS. POLK: Your Honor, I move for the
 6 admission of Exhibits 822, 823 and 827.
 7 MR. LI: No objection.
 8 THE COURT: 822, -23 and -27 are admitted.
 9 (Exhibits 822, 823 and 827 admitted.)
 10 **Q.** BY MS. POLK: I'll put up on the overhead
 11 823 to ask you, Mr. Mercer, what part of the sweat
 12 lodge are we looking at here?
 13 **A.** **That is the front part. You can see the**
 14 **door is open.**
 15 **Q.** Then I'm going to put up on the overhead
 16 822. Do you know what side of the sweat lodge
 17 we're looking at here?
 18 **A.** **That would be around the back of it. Not**
 19 **quite all the way back on the right side, I guess.**
 20 **Q.** Then I'm going to put up on the overhead
 21 827. Do you know what we're looking at here?
 22 **A.** **That's the inside and a couple of flaps**
 23 **that were opened up.**
 24 **Q.** And you've just testified about running
 25 to the area where your wife had opened up the back?

1 **A.** **Uh-huh.**
 2 **Q.** Do you see that area on this photograph?
 3 **A.** **It was this area over here.**
 4 **Q.** And when you arrived, two people were
 5 out?
 6 **A.** **Two people were out.**
 7 **Q.** And then you testified about a third
 8 person. Where was that third person?
 9 **A.** **The third person was approximately --**
 10 **maybe it was right here where this opening was.**
 11 **Q.** Was that person in or out?
 12 **A.** **He was still inside.**
 13 **Q.** Do you know how that person got out?
 14 **A.** **Yeah. I dragged him out with my**
 15 **daughter.**
 16 **Q.** What did you do -- was that person male
 17 or female?
 18 **A.** **He was a male.**
 19 **Q.** Did you ever learn that person's name?
 20 **A.** **Yes, I did. But I don't remember it now.**
 21 **Q.** What did you do with that person?
 22 **A.** **Well, I noticed that he was still**
 23 **breathing, so just left him in the fetal position**
 24 **and put him just outside. After that more people**
 25 **came around.**

1 **Q.** The other two people that were dragged
 2 out by your wife and daughter -- do you recall if
 3 they were male or female?
 4 **A.** **One was a male, one was a female.**
 5 **Q.** And when you first became aware of them,
 6 were they already outside?
 7 **A.** **Yes.**
 8 **Q.** What did you then do for them?
 9 **A.** **Well, I checked their vital signs. I**
 10 **looked at their face. And their face was starting**
 11 **to turn blue, and their lips were blue. I checked**
 12 **for any breathing and any pulse.**
 13 **Q.** What did you -- with respect to the
 14 female, tell the jury specifically what you
 15 observed.
 16 **A.** **I observed blue lips, a blueing face, a**
 17 **grayish face, no pulse. I checked on her neck and**
 18 **their arm. And there was no signs ever breathing**
 19 **either.**
 20 **Q.** Do you have first aid training?
 21 **A.** **Yeah. I'm a first response -- emergency**
 22 **first response instructor.**
 23 **Q.** When did you get your training?
 24 **A.** **In 2004.**
 25 **Q.** And are you a certified emergency first

1 response trainer?

2 **A. Right now I am nonteaching status.**

3 **But --**

4 **Q.** In 2009 what were you?

5 **A. Nonteaching status.**

6 **Q.** When had you gone from a teacher to a

7 nonteacher?

8 **A. Probably 2008.**

9 **Q.** And as a teacher, what does that mean?

10 **A. I would teach people who wanted to learn**

11 **emergency first aid and CPR, adult CPR.**

12 **Q.** Did you ever learn the name of the

13 female?

14 **A. Kirby Brown.**

15 **Q.** And when did you learn her name?

16 **A. Couple days afterwards.**

17 **Q.** The second person that came out in the

18 area where Kirby Brown came out -- was that male or

19 female?

20 **A. He was a male.**

21 **Q.** And what did you do for that person?

22 **A. Well, I checked his vital signs also and**

23 **saw that he didn't have any vital signs either.**

24 **The same thing. His face was getting gray. His**

25 **lips were blue. There was no pulse or no**

1 **breathing.**

2 **Q.** Did you hear anything -- did you hear

3 interaction between your wife, Debbie, and anybody

4 else before you ran over there?

5 **A. No.**

6 **Q.** The first you were aware of was your wife

7 calling for you?

8 **A. Exactly.**

9 **Q.** With respect to the female that you

10 learned was Kirby Brown, did you make an

11 observation about her overall physical build?

12 **A. Yeah.**

13 **Q.** What did you observe?

14 **A. Well, she was a thin girl and in good**

15 **shape.**

16 **Q.** And with respect -- did you learn the

17 name of the male?

18 **A. I did. But I can't recall it right now.**

19 **Q.** Do you recall that his name was James

20 Shore?

21 **A. Yes.**

22 **Q.** Did you observe Mr. Shore's overall

23 physical build?

24 **A. Yeah. He was a rather large gentleman.**

25 **Q.** And did you make any observations about

1 whether he was -- appeared to be fit to you?

2 **A. Well, his belly was rather big. It**

3 **didn't look like he was a fitness instructor or**

4 **anything like that.**

5 **Q.** Did anybody else come over to help you

6 with Kirby and James?

7 **A. Yeah. Right after I told my wife to call**

8 **for the ambulance, there were five or six people**

9 **there right away.**

10 **Q.** When was it -- how soon from the time you

11 ran over and took the vitals was it that you told

12 your wife to call 9-1-1?

13 **A. Instantly. Right after the I checked the**

14 **girl out.**

15 **Q.** Did you see what your wife did?

16 **A. She -- she left.**

17 **Q.** Do you recall today, then, how much time

18 passed from the time Debbie left and emergency

19 first responders arrived?

20 **A. Probably half hour.**

21 **Q.** Did anybody identifying themselves as a

22 doctor come over to help with the two people you

23 were with?

24 **A. Yeah. That's why I stepped aside.**

25 **Because someone identified themselves as a doctor**

1 **and said she was in control. So I just stayed with**

2 **Kirby, and I held her head and made sure that her**

3 **airway was open and checked her vital signs.**

4 **Q.** Did you perform any CPR on Kirby?

5 **A. Yeah. At first I gave her a first couple**

6 **puffs. And then other people came over, and so**

7 **they just took over.**

8 **Q.** And did you perform any CPR on James

9 Shore?

10 **A. No, I did not.**

11 **Q.** Did you see whether anybody else started

12 CPR on James?

13 **A. Yeah. There were some people there.**

14 **There was, like, three or four people working on**

15 **him.**

16 **Q.** Did you ever observe, again, the third

17 individual that was pulled out?

18 **A. Not that I can recall. Because I just**

19 **stayed with Kirby right then until the paramedics**

20 **came.**

21 **Q.** After the paramedics came, what did you

22 do?

23 **A. I went and assisted any other person that**

24 **looked like they needed help.**

25 **Q.** Do you recall how many other people you

1 assisted?
2 **A. Not particular numbers. But there were**
3 **several people that needed something. I actually**
4 **helped carry people to the helicopters at two**
5 **different occasions.**

6 **Q.** Do you know who it was that you carried
7 to the helicopters?

8 **A. I have no idea.**

9 **Q.** At the scene were you ever aware of
10 anyone else who was unconscious?

11 **MR. LI:** Your Honor, I'm going to object to
12 the term "unconscious."

13 **THE COURT:** It's just the terminology. But
14 just as to form, Ms. Polk.

15 **Q.** BY MS. POLK: After attending to James
16 Shore and Kirby Brown, did you attend anybody else
17 whose eyes were closed?

18 **A. I didn't. No.**

19 **Q.** How long were you at the area that night?

20 **A. Probably till about 8:00 or 9:00. I**
21 **can't say for sure. But we were there until most**
22 **everyone left because the police told everybody**
23 **they needed to stay around.**

24 **Q.** Okay. Where were you when the police
25 arrived?

1 **A. I was working on Kirby Brown.**

2 **Q.** Where were you when the police announced
3 that everybody needed to stay around?

4 **A. You know, I don't think I heard that from**
5 **a police officer himself. But I heard it from**
6 **other people because I was going to go home. And I**
7 **heard that -- you know -- you need to stick around.**

8 **Q.** I'm going to put up on the overhead
9 Exhibit 229 and just ask you generally if you
10 recognize that scene?

11 **A. Yes, I do.**

12 **Q.** And when you were tending to James Shore
13 and Kirby Brown, were you aware of where Mr. Ray
14 was?

15 **A. Well, no. He -- well, before I went over**
16 **there, he was sitting in this little tarp over**
17 **here. And then at one time when I was working on**
18 **her, he came over, and I saw him looking at what**
19 **was going on.**

20 **THE COURT:** Excuse me, Ms. Polk. I don't
21 believe that exhibit has been admitted.

22 **MS. POLK:** I'm sorry. You're right.

23 **MR. LI:** We'll stipulate.

24 **MS. POLK:** Your Honor, this is Exhibit 229.

25 **THE COURT:** 229 is admitted.

1 (Exhibit 229 admitted.)

2 **Q.** BY MS. POLK: When Mr. Ray came over to
3 where Kirby Brown and James Shore was, you were
4 still there?

5 **A. Yes.**

6 **Q.** Do you recall if he said anything?

7 **A. No.**

8 **Q.** Do you recall what he did?

9 **A. I think he was just looking at what was**
10 **going on.**

11 **Q.** I'm going to -- I'm going to put up on
12 the overhead Exhibit 278 and ask you if you
13 recognize what this is a photograph of.

14 **THE COURT:** And that will be admitted by
15 stipulation?

16 **MR. LI:** Yes, Your Honor.

17 **MS. POLK:** I'm sorry.

18 **THE COURT:** 278 is admitted.

19 (Exhibit 278 admitted.)

20 **THE WITNESS:** That's the sweat lodge after it
21 was over.

22 **Q.** BY MS. POLK: Do you know who the man
23 sitting in that chair is?

24 **A. No, I don't.**

25 **Q.** And are you able to read the shirt?

1 **A. The Verde Valley District, Fire District.**

2 **Q.** Yes.

3 Your Honor, counsel has stipulated to the
4 admission of Exhibit 281. No. Let me check that
5 again.

6 821, 819, 820, 818, 817, 825. 822 might
7 already be in. I'm not sure.

8 **THE COURT:** Ms. Polk, I've got a note that the
9 jurors are requesting a break at this time. If we
10 can do that, of course.

11 Ladies and gentlemen, we'll take an
12 afternoon recess, then. Please be reassembled at
13 15 after. That's about 25 minutes. Remember the
14 admonition.

15 Mr. Mercer, recall that rule of exclusion
16 I discussed with you earlier.

17 You are excused at this time as well.

18 (Recess.)

19 **THE COURT:** The record will show the presence
20 of the defendant, Mr. Ray, the attorneys, the jury.

21 Mr. Mercer is back on the witness stand.

22 Ms. Polk, we do need to stop about 4:30
23 this afternoon.

24 So please continue.

25 **MS. POLK:** Thank you, Your Honor.

1 Q. Mr. Mercer, you testified earlier that
2 you are an emergency first responder instructor.
3 Where did you get your training?

4 A. From an organization, PADI, Professional
5 Instructor of Diving -- I don't know what it is.
6 It's a diving organization. Scuba diving.

7 Q. When did you get that certification?

8 A. In '06, 2006.

9 Q. Where?

10 A. In Phoenix at a -- at a dive shop. I
11 can't remember of name of it right now.

12 Q. Are you a scuba diver?

13 A. Yes, I am. I'm an instructor.

14 Q. How long was the training that you
15 received to become a first responder instructor?

16 A. I think it lasted a week.

17 Q. And do you recall approximately how many
18 courses, then, you taught as the instructor?

19 A. I taught -- I think it's people. They
20 mark it as people. I think there is about 25
21 people.

22 Q. Between what period of time?

23 A. 2006 to 2008.

24 Q. And as an emergency first responder
25 instructor, do you know how to tell the difference

1 whether someone is conscious or unconscious?

2 A. Yes. I think so.

3 MR. LI: Your Honor, if I could just have a
4 point of clarification. I'm not sure he's
5 testified as an emergency first responder. I think
6 that's a paramedic. If we can clarify what exactly
7 he's been trained in.

8 THE COURT: Ms. Polk, ask an additional
9 foundational question.

10 Q. BY MS. POLK: What is your certification
11 in?

12 A. I'm an emergency first responder
13 instructor.

14 Q. And I can't remember if you answered my
15 question. But as an emergency first responder
16 instructor, do you know how to tell whether someone
17 is unconscious or conscious?

18 A. Yes, I can.

19 Q. And with respect to Mr. Ray's sweat lodge
20 ceremony in October of 2009, other than the three
21 people you testified about, did you observe whether
22 anybody else at the scene was unconscious?

23 A. Yes, I did.

24 Q. Tell the jury what you observed.

25 A. I observed people laying on the ground

1 with -- with no response. They were breathing and
2 their heart was beating, but they weren't moving or
3 they weren't doing anything.

4 Q. When was it that you first observed
5 somebody in that condition?

6 A. That was after the paramedics arrived and
7 I wasn't working on Kirby anymore.

8 Q. In 2009 did you observe whether any
9 participant was vomiting?

10 A. Yes.

11 Q. When did you observe someone vomiting?

12 A. When this person was coming out of the --
13 right out of the sweat lodge right at the door.
14 And they vomited right there.

15 Q. Do you recall what round that was?

16 A. No.

17 Q. Do you recall if you observed more than
18 one person vomiting in 2009?

19 A. Yes.

20 Q. Do you recall approximately how many
21 people?

22 A. Three or four.

23 Q. And with respect to Mr. Ray's sweat lodge
24 ceremony in 2008 -- this is a yes or no question --
25 did you observe anybody vomiting?

1 A. Yes.

2 Q. And with respect to Mr. Ray's sweat lodge
3 ceremony in 2007, yes or no, did you observe
4 anybody vomiting?

5 A. Yes.

6 Q. In Mr. Ray's sweat lodge ceremony
7 of 2009, did you observe the eyes of any
8 participants at any time?

9 A. Sure.

10 Q. Specifically what did you observe about a
11 participant's eyes?

12 A. There was two ladies, actually, that they
13 would look right through you. They were up and
14 they were sitting, but they couldn't tell you their
15 name. They couldn't tell you what the date was,
16 what year it was. They had no idea where they
17 were. But you could ask them questions, and they'd
18 look at you, but their eyes would go right past
19 you.

20 Q. Do you recall what round that was?

21 A. That was by the end of the sweat lodge.

22 Q. And this is yes or no question. In 2008
23 at any time during or after Mr. Ray's sweat lodge
24 ceremony, then, did you observe participants' eyes?

25 A. Yes.

1 Q. In 2007, yes or no, at any time during or
2 after Mr. Ray's sweat lodge ceremony, did you
3 observe the eyes of participants?

4 A. Yes.

5 Q. In 2009 did you observe any other
6 nonordinary symptoms among the participants?

7 MR. LI: Objection to the term "nonordinary
8 symptoms." Form of the question.

9 THE COURT: Sustained.

10 Q. BY MS. POLK: In 2009, Mr. Mercer, did
11 you observe any other symptoms of distress other
12 than what you've already testified to?

13 A. Yes.

14 Q. And specifically what did you observe?

15 A. **Just people crawling out of the sweat
16 lodge, laying around, getting hosed off, and just
17 laying in the dirt and laying on the tarps, and
18 just their faces are all red. And they're just
19 laying in the dirt trying to recover from their
20 experience.**

21 Q. I want to ask you about the wood used
22 in 2009 to heat the rocks. You testified about the
23 wood -- I believe you used the term "construction
24 wood."

25 A. Yes.

1 Q. Do you know -- this is yes or no. Do you
2 know whether or not that wood was pressed?

3 A. No.

4 Q. You do not know?

5 A. No.

6 Q. And do you know whether or not that wood
7 was treated?

8 A. No.

9 Q. You do not know?

10 A. **No, I do not.**

11 Q. Do you recall, Mr. Mercer, what
12 directions the smoke from your fire was blowing
13 in 2009?

14 A. **It would blow in all directions. Right
15 there it was -- it would seem to be going up and to
16 the east a bit, but -- you know -- the wind would
17 pick up and -- you know -- in front of the fire it
18 draws the smoke at you. So it would swirl around.**

19 Q. Do you recall whether the smoke ever went
20 inside the sweat lodge itself?

21 A. **No. It did not.**

22 Q. Do you recall -- we'll put up on the
23 overhead Exhibit 230. Directing your attention to
24 the tent here, do you recall whether or not there
25 was -- there were beverages to drink for Mr. Ray's

1 October 2009 sweat lodge?

2 A. Yes.

3 Q. Did you drink any of it?

4 A. **Yes. I probably did.**

5 Q. Did you get sick?

6 A. No.

7 Q. Do you recall whether or not there was
8 anything to eat?

9 A. **That day during the sweat lodge, there
10 wasn't. But afterwards I believe they brought out
11 some fruit. We usually do. You know, I can't
12 remember specifically if they brought out fruit for
13 this one or if they ate it back in the kitchen.**

14 Q. Do you recall if you ate any of the fruit
15 after the ceremony?

16 A. **I probably didn't.**

17 Q. Did you ever receive any instruction from
18 Mr. Ray or his staff about how to care for a
19 participant during his sweat lodge ceremony?

20 MR. LI: Objection, Your Honor. Subject to
21 motion that we have under consideration.
22 Relevance. Also saying Mr. Ray giving the
23 instructions.

24 THE COURT: There wasn't a reference to a
25 year.

1 Sustained.

2 Q. BY MS. POLK: For the 2009 sweat lodge
3 ceremony, did you ever receive any instruction from
4 Mr. Ray or Mr. Ray's staff about how to care for
5 participants?

6 MR. LI: Same objection, Your Honor.

7 THE COURT: Overruled.

8 You may answer that.

9 THE WITNESS: No.

10 Q. BY MS. POLK: And for Mr. Ray's 2008
11 sweat lodge ceremony, did you ever receive any
12 instructions from Mr. Ray or Mr. Ray's staff about
13 how to care for participants?

14 MR. LI: Same objection.

15 THE COURT: Sustained.

16 Q. BY MS. POLK: Why, Mr. Mercer, did you do
17 what you did for the participants in 2009?

18 A. **Because they looked like they needed
19 help.**

20 Q. Did you understand that to be your
21 function there?

22 A. **Well, no. My function was a fire keeper.**

23 Q. I want to look now at a series of
24 photographs.

25 If I can just check with the clerk.

1 Your Honor, I think right before the
2 break I had told you that counsel had stipulated to
3 the admission of the following exhibits but they --

4 THE COURT: I don't think we quite gotten to
5 the full list. I have two -- 821, -19, -20, -18,
6 -17, -25 and -22. That is 821 through 822 with
7 some.

8 MS. POLK: And the state would move for their
9 admission.

10 MR. LI: No objection, Your Honor.

11 THE COURT: To make it clear, what I have is
12 821, 819, 820, 818, 817, 825 and 822.

13 Is that correct?

14 MS. POLK: Yes.

15 THE COURT: Without objection, those exhibits
16 are admitted.

17 (Exhibits 817 through 822 and 825
18 admitted.)

19 Q. BY MS. POLK: I'm going to put up on the
20 overhead, Mr. Mercer, Exhibit 817 and just ask you
21 if you recognize that?

22 A. Yes. That's -- that's a sweat lodge.

23 Q. Do you recognize that to be a photograph
24 taken on October 9th, 2009, the day after the sweat
25 lodge ceremony?

1 A. Yes. It looks like it because of the
2 police tape there.

3 Q. Were you at the scene on October 9th?

4 A. The day after?

5 Q. Yes.

6 A. Yes.

7 Q. Did you go down to the sweat lodge
8 itself?

9 A. Yes.

10 Q. You did not enter the crime scene tape?

11 A. I couldn't.

12 Q. I want to ask you specifically about --
13 are you able to tell the jury what this is right
14 here?

15 A. It looks like some towels or a blanket or
16 something.

17 Q. Do you know what this is up here?

18 A. Another towel, looks like.

19 Q. And do you know what this is over here?

20 A. It looks like one of the blankets from
21 underneath the tarps.

22 Q. Do you know how a blanket from underneath
23 the tarp got on top of the sweat lodge?

24 A. Well, yeah. It's ripped apart. So if
25 you're going to lift it up, you've going to get to

1 blankets. And then somebody probably just tore it
2 out.

3 Q. Do you know what this is over here?

4 A. I think this is another blanket or
5 something like that. Because it was torn up on
6 that side too.

7 Q. I'm going to put up on the overhead
8 Exhibit 820. Do you know what this is down in the
9 corner?

10 A. Looks like blankets.

11 Q. Do you know how a blanket from -- do you
12 know where that blanket came from?

13 A. I couldn't tell you. It could be towels.
14 It could be blankets. And when the people were
15 down helping us, they gave us blankets to wrap up
16 in because it was getting cold. It could have been
17 one of those.

18 Q. Were you ever aware of blankets being
19 taken from the sweat lodge itself that night?

20 A. Not myself.

21 Q. You did not do that?

22 A. No.

23 Q. Do you know whether other people did it?

24 A. Not to my knowledge.

25 Q. I'm going to put up on the overhead

1 Exhibit 822. Do you know what side of the sweat
2 lodge this is a picture of?

3 A. Yeah. As you're facing the door, that
4 would be the rear right side. The rear left side.
5 I'm sorry.

6 Q. And do you know what this is up here at
7 the top?

8 A. That's one of the blankets we cover the
9 sweat lodge with.

10 Q. I'm going to put up on the overhead
11 Exhibit 823.

12 Do you recognize that?

13 A. Yes, I do.

14 Q. Will you tell the jury what we're seeing
15 here.

16 A. That's the sweat lodge again after --
17 after a sweat.

18 Q. Does the sweat lodge normally look like
19 this after a sweat?

20 MR. LI: Objection, Your Honor. Obviously,
21 the police have come to the scene.

22 THE COURT: Sustained.

23 Q. BY MS. POLK: I'm going to put on the
24 overhead Exhibit 818.

25 Do you recognize that?

1 **A. Yes, I do.**
 2 **Q.** You had testified about a second fire
 3 where the intentions were thrown in to be burned?
 4 **A. Yes.**
 5 **Q.** Do you see the location of that fire in
 6 this photograph?
 7 **A. No. I don't.**
 8 **Q.** Can you point to the jury where it would
 9 be, off to what side.
 10 **A. It would be off to the right side of the**
 11 **picture, outside here by where the chairs are but**
 12 **just over further. Probably another 50 feet or so.**
 13 **Q.** I'm going to put up on the overhead
 14 Exhibit 819. Again, do you recognize this
 15 photograph?
 16 **A. Yes, I do.**
 17 **Q.** Do you recognize what this is?
 18 **A. It looks like a five-gallon bucket upside**
 19 **down.**
 20 **Q.** Do you recognize what this is?
 21 **A. Yeah. That's one of the water buckets.**
 22 **Q.** Do you have a recollection from the
 23 afternoon of October 8th of those buckets being
 24 there?
 25 **A. Yeah. They were on the table in that**

1 **tarp with water and electrolytes and juice in them.**
 2 **There was three of them, I think, all together.**
 3 **Q.** Do you know how they got in the positions
 4 that we see them in this photograph?
 5 **A. No. I do not.**
 6 **Q.** I'm going to put up on the overhead
 7 Exhibit 821.
 8 And if you will just orient the jury. On
 9 this photograph where would the door be?
 10 **A. We're directly in the back of the sweat**
 11 **lodge. So the door would be right here on the**
 12 **ground.**
 13 **Q.** On the other side?
 14 **A. On the other side.**
 15 **Q.** What are we looking at right here?
 16 **A. That looks like the two sticks that I**
 17 **tied the door to. I have another two sticks that**
 18 **we have ropes tied to, and I throw it over the**
 19 **sweat lodge so the door won't fall.**
 20 **Q.** Would those two sticks normally be in the
 21 position we see in this photograph?
 22 **A. No. Not very likely. They'd probably be**
 23 **hanging about mid level of the sweat lodge or on**
 24 **the ground.**
 25 **Q.** On this side that we can see in the

1 photograph?
 2 **A. Yes.**
 3 **Q.** Where is the door in this photograph?
 4 **A. The door is on the other side. We're**
 5 **looking directly at the back. So this is kind of**
 6 **an anchor so the door won't fall while the sweat**
 7 **lodge is going on.**
 8 **Q.** And if you can draw, where would the
 9 sticks be hanging?
 10 **A. Usually they'd be right around here or on**
 11 **the ground with some rocks on them.**
 12 **Q.** And then explain to the jury how those
 13 two sticks, then, connect to the door.
 14 **A. Two ropes. I wrap them together, put**
 15 **rope on each side and it goes to the stick that's**
 16 **holding the door on.**
 17 **Q.** Do you know what the coverings are that
 18 are seen in this photograph?
 19 **A. Those are some of the blankets that we**
 20 **used to cover the sweat lodge.**
 21 **Q.** Do you know how they got up to the top of
 22 the sweat lodge?
 23 **A. No, I don't.**
 24 **Q.** I'm going to show you Exhibit 824. Do
 25 recognize what that is?

1 **A. That's a towel and a hat.**
 2 **Q.** I'm going to show you 825. Do you
 3 recognize what that is?
 4 **A. Those are the inside, and those are the**
 5 **moving blankets.**
 6 **Q.** With respect to 824, do you have a
 7 recollection as to whether or not those towels were
 8 used on October 8th?
 9 **A. Yes. They were.**
 10 MS. POLK: Your Honor, I move for the
 11 admission of Exhibit 824.
 12 MR. LI: No objection.
 13 THE COURT: 824 is admitted.
 14 (Exhibit 824 admitted.)
 15 **Q.** BY MS. POLK: I'm going to put 824 on the
 16 overhead. Do you know when this photograph was
 17 taken?
 18 **A. No, I don't.**
 19 **Q.** Will you show the jury the towel that you
 20 recognize in this photograph?
 21 **A. Well, these two towels here look like the**
 22 **towels that we use for sweat lodges.**
 23 **Q.** And then in the photograph we see -- what
 24 does this appear to be to you?
 25 **A. A flip-flop sandal.**

1 Q. Do participants wear footwear into the
2 sweat lodges?

3 A. No.

4 Q. And then what is this right here?

5 A. That's a rock.

6 Q. Do you know what kind of rock?

7 A. Regular rock. It's not a lava rock, I
8 don't think.

9 MS. POLK: Your Honor, counsel has stipulated
10 to the admission of Exhibit 825.

11 THE COURT: 825 is admitted.

12 Q. BY MS. POLK: I'm going to put up
13 Exhibit 825, Mr. Mercer, which is the photograph
14 taken the next day, October 9, and ask you if you
15 recognize this photograph?

16 A. Yes, I do.

17 Q. Tell the jury what that is.

18 A. That's the inside of the sweat lodge, and
19 those are moving blankets.

20 Q. Show the jury where the moving blankets
21 are.

22 A. Well, the blue ones are here. And this
23 particular section has been sewn together so it
24 wraps around quite a bit. There is some gray ones
25 up here and up here.

1 Q. Are there any tarps that can be seen from
2 the inside of the sweat lodge?

3 A. No. Not in this picture I don't see.

4 MS. POLK: Your Honor, counsel has agreed to
5 the admission of 826 and 828.

6 THE COURT: 826 and 828 are admitted.

7 (Exhibits 826 and 828 admitted.)

8 Q. BY MS. POLK: I'm going to put up on the
9 overhead Exhibit 826, Mr. Mercer, and ask you if
10 you recognize that?

11 A. That looks like the inside of the sweat
12 lodge.

13 Q. Do you know what part of the sweat lodge
14 this is a photograph of?

15 A. It would probably be the top, the ceiling
16 part.

17 Q. Do you recognize it would be the sweat
18 lodge used in October of 2009?

19 A. Oh, with that picture I couldn't tell
20 you.

21 Q. Can you tell the jury what the material
22 is we're looking at in this photograph?

23 A. Those are moving blankets and other
24 blankets.

25 Q. Will you point to the moving blankets.

1 A. The blue ones here are the moving
2 blankets. And this is, like, a blanket off a bed
3 or something.

4 Q. Are there any tarps that you see?

5 A. Not there I don't. No.

6 Q. Would you expect to see tarps on the
7 inside of the sweat lodge?

8 A. No.

9 Q. I'm going to put up on the overhead
10 Exhibit 828.

11 Do you recognize that?

12 A. Those are the rocks, the burnt rocks,
13 that are inside the sweat lodge.

14 Q. I'm going to show you Exhibit 829. Do
15 you recognize that photograph?

16 A. I recognize the area. Yes.

17 Q. Do you recognize anybody in that
18 photograph?

19 A. I see my wife, with the hat on, hugging
20 somebody. And that's about it. The rest of them
21 I'm not sure. It's pretty blurry.

22 MS. POLK: Your Honor, I move for the
23 admission of Exhibit 829.

24 MR. LI: No objection.

25 THE COURT: 829 is admitted.

1 (Exhibit 829 admitted.)

2 Q. BY MS. POLK: I'm going to publish 829,
3 Mr. Mercer.

4 Recognizing that the photograph itself is
5 blurry, will you show the jury where your wife is.

6 A. This is my wife with the hat.

7 Q. Do you recognize any of the people down
8 here?

9 A. No, I do not.

10 Q. You testified about that evening. And
11 will you just tell the jury how long you stayed
12 down at the scene.

13 A. Until probably around 10:00 o'clock, I
14 think.

15 Q. And did you ever go up to the dining room
16 at Angel Valley?

17 A. Yeah. We went home, and then my wife
18 wasn't feeling so well. So I went to the dining
19 room to get a paramedic.

20 Q. And I'm going to put back up our map,
21 which is Exhibit 140. Show the jury, when you say
22 you went home, where you went.

23 A. It's glaring right over my house, but
24 this is -- that's my house, or that's the house I
25 was renting.

1 Q. Is the dining room on this photograph?
 2 Do you see it?
 3 A. No.
 4 Q. I recognizing that it's glaring.
 5 A. Yeah.
 6 Q. Where would the dining room be?
 7 A. The dining room is right here.
 8 Q. Is that walking distance from your house?
 9 A. Oh, yeah.
 10 Q. What -- who else was at your house when
 11 you went back there that evening?
 12 A. I think Fawn Foster was there and my
 13 daughter was there. And I think Shawna was there
 14 for a little bit. I don't remember her last name,
 15 though.
 16 Q. Is Shawna related to you?
 17 A. No, she isn't. She's just a friend.
 18 Q. What generally was the mood in your
 19 household that night?
 20 A. It was pretty somber. Yeah.
 21 Q. How was -- what was going on with Debbie
 22 that made you go back up to the dining room?
 23 A. Well, she wasn't feeling very well. And,
 24 in particular, if she doesn't eat for a long time
 25 and gets stressed out, she gets really hungry and

1 then starts feeling bad. I wasn't sure if it was
 2 just that or if it was part of what was going on
 3 with the sweat lodge. So I went and got a
 4 paramedic just to be safe.
 5 Q. From the dining room?
 6 A. Yes.
 7 Q. Did one go back to your house with you?
 8 A. Yes, he did.
 9 Q. What happened then?
 10 A. He checked out Debbie, and he said it
 11 would be best if we went to the hospital.
 12 Q. Did you take Debbie to the hospital?
 13 A. Yes, I did.
 14 Q. Where was your daughter, Sarah, when you
 15 did that?
 16 A. She stayed home with Fawn.
 17 Q. What hospital did you take Debbie to?
 18 A. The Sedona hospital.
 19 Q. How long were you at the Sedona hospital?
 20 A. Couple hours probably.
 21 Q. And at the hospital did anybody from the
 22 Yavapai County Sheriff's Office find you?
 23 A. Yes.
 24 Q. And was an interview conducted?
 25 A. Yes, there was.

1 Q. Do you recall how long that interview
 2 was?
 3 A. Half hour, 45 minutes.
 4 Q. Where were you when that interview was
 5 conducted?
 6 A. In the room with Debbie.
 7 Q. Was Debbie being treated during the
 8 interview?
 9 A. Yes, she was.
 10 Q. Will you describe for the jury what you
 11 observed about what sort of treatment Debbie was
 12 getting.
 13 A. She was getting an IV and some oxygen.
 14 Q. Did you cooperate fully with that
 15 interview?
 16 A. Sure.
 17 Q. And how about Debbie?
 18 A. Yes. She had an oxygen mask over her, so
 19 I answered most of the questions.
 20 Q. Did a second interview take place with
 21 law enforcement?
 22 A. Yes.
 23 Q. Do you recall when that was?
 24 A. It was the next day.
 25 Q. And where?

1 A. Right by the sweat lodge.
 2 Q. Do you recall who it was that interviewed
 3 you then?
 4 A. Detective Diskin.
 5 Q. Had you ever met Detective Diskin before?
 6 A. No.
 7 Q. And this time were you alone or with
 8 Debbie?
 9 A. Well, the three of us, Debbie and I and
 10 Sarah, walked down there because we didn't give any
 11 statements that night. So we knew we were about to
 12 leave the property. So we knew we needed to talk
 13 to the police and give them our statement before we
 14 left.
 15 Q. It was you who approached the detective?
 16 A. Yes.
 17 Q. When he took your statement, were you
 18 alone with him?
 19 A. Yes, I was. Well, there was another
 20 officer there, I think. I'm not sure. Debbie or
 21 Sarah weren't there.
 22 Q. You were by yourself?
 23 A. Yes.
 24 Q. Did you cooperate fully then?
 25 A. Oh, sure.

1 Q. Did you ever provide a statement to law
2 enforcement with an attorney present?

3 A. No. I mean -- no. No.

4 Q. I'm going to have a few questions for you
5 about other sweat lodge ceremonies that you
6 assisted with at Angel Valley between 2007
7 and 2009.

8 A. Uh-huh.

9 Q. Specifically in 2007 for ceremonies not
10 conducted by Mr. Ray, did you ever observe anybody
11 vomit?

12 A. No.

13 Q. Did you ever observe anybody -- let me
14 ask you this: Did you ever have to assist somebody
15 out of a sweat lodge conducted by someone other
16 than Mr. Ray?

17 A. No.

18 Q. Did you ever observe anybody unconscious
19 in 2007 for a ceremony not conducted by Mr. Ray?

20 A. No.

21 Q. And in 2008, I want to talk about the
22 ceremonies that you assisted not conducted by
23 Mr. Ray. And with respect to those ceremonies, did
24 you ever observe anybody vomiting?

25 A. Not at all.

1 Q. Did you ever observe anybody that you
2 needed to assist or drag out?

3 A. No.

4 Q. Did you ever observe anybody unconscious?

5 A. No.

6 Q. Did you ever observe anybody sick?

7 A. No.

8 Q. With respect to the additional ceremony
9 that you assisted with in 2009 -- not Mr. Ray's but
10 the other one not conducted by Mr. Ray -- did you
11 ever observe anybody sick?

12 A. No.

13 Q. Did you ever observe anybody vomiting?

14 A. No.

15 Q. Did you ever need to assist anybody to
16 come out of that ceremony?

17 A. No.

18 Q. Did you ever observe anybody sick in any
19 way?

20 A. No.

21 Q. For the sweat lodge ceremonies conducted
22 in 2007 not conducted by Mr. Ray, what is the
23 normal length of the ceremony in terms of rounds?

24 MR. LI: Objection, Your Honor. Relevance.
25 Every sweat lodge is different.

1 THE COURT: Counsel, please approach a minute.

2 Ladies and Gentlemen and Mr. Mercer,
3 please feel free to stand and stretch.

4 (Sidebar conference.)

5 MR. LI: If I can just pose a standing
6 objection to all these questions along the lines of
7 the extensive conversation this morning. I don't
8 want to keep objecting in front of a jury.

9 THE COURT: We've got a pending objection I
10 want to deal with. And it had to do with the
11 length of other sweat lodges.

12 MR. LI: May I address that issue?

13 THE COURT: That's what I wanted. I'm
14 thinking back. It's not my practice to allow
15 standing objections. If you want to make a more
16 elaborate --

17 Go ahead, Mr. Li. One thing at a time.
18 Let's go ahead and talk about your objections to
19 Ms. Polk's last question.

20 MR. LI: With respect to the last question,
21 it's implying some sort of standard of care
22 relating to sweat lodge practices. We've had
23 extensive conversations at sidebar about this with
24 various people that have had experience in sweat
25 lodges.

1 This guy is not an expert in sweat.
2 Lodges. He's not been disclosed as an expert. His
3 testimony about what normal lengths are implies --
4 improperly implies some sort of standard of care
5 relating to the practice of sweat lodges.

6 And we would object to that.

7 THE COURT: Ms. Polk, go ahead.

8 MS. POLK: I think it's appropriate for the
9 jury to know that the nondefendant sweat lodges --
10 how they're conducted. They know that nobody got
11 sick in those. And I think it's important,
12 actually. I think it's important to a fair
13 recitation of the facts. Particularly important to
14 the defense case for the jury to understand that
15 these are shorter, that the door is open for longer
16 periods of time, that fewer rocks are used, and
17 that's part of the explanation as for why people
18 are not getting sick.

19 But I do think that a comparison between
20 how Mr. Ray conducts his sweat lodges and how other
21 sweat lodges where people are not getting sick is
22 relevant and directly relevant to the issue of
23 causation, as we discussed this morning.

24 MR. LI: This is where that blurring takes
25 place, Your Honor. There is no foundation it's

1 even the same sweat lodge in any material respect.
 2 The idea that some other ceremonies that were
 3 conducted in 2007 in a completely separate sweat
 4 lodge isn't, even the same sticks, has any
 5 relevance to what happened in 2009. Just is
 6 exactly the reason why we objected so strenuously
 7 this morning. There is just no connection. We
 8 think this is propensity evidence, Your Honor.

9 MS. POLK: Your Honor, it's not propensity
 10 evidence. And the jury understands that in 2007
 11 and until October of 2008 the testimony from this
 12 witness has been extensive that it's a different
 13 kiva but, basically, the same set of coverings.

14 What's important is that even when it's a
 15 different kiva, even when it is different, it's the
 16 sweat lodge used by Mr. Ray. People get sick. And
 17 when not used by Mr. Ray, people are not getting
 18 sick.

19 Part of the reason for that explanation
 20 is how he runs the sweat lodge itself -- how long
 21 it is, how many rounds, how many rocks. I made it
 22 clear through this witness's testimony what the
 23 similarities are, what was the same and what was
 24 not the same.

25 And I'd also like to finish bringing in

1 the evidence that the common denominator is
 2 Mr. Ray. It doesn't really matter what the
 3 structure is. If it's Mr. Ray's event, people get
 4 sick. If it's a NonMr. Ray event, people do not
 5 get sick even when it's a different kiva. When
 6 it's the same kiva, same thing. Same kiva, same
 7 coverings, later years, it's the same thing. It's
 8 only Mr. Ray's sweat lodges that people get sick.
 9 And it goes to the issue of causation.

10 THE COURT: And that's the only way it can be
 11 admitted.

12 So, Mr. Li, I know you say, the blurring.
 13 And I understand. And that's -- if we're talking
 14 about 404(b) and other acts, this really isn't
 15 other-act type of situation. Then that's a
 16 consideration. That's always been an issue.

17 MR. LI: There is also the 403 issue relating
 18 to whether or not the state is implying some kind
 19 of standard of care relating to sweat lodges.
 20 We've had extensive bench conferences with other
 21 witnesses who have had prior sweat lodge
 22 experience. The Court has sustained objections
 23 relating to that for precisely this reason.

24 The problem with the state's theory is
 25 they lack foundation to show that the sweat lodges

1 are the same. As a consequence, you cannot
 2 establish the causation issue. It just can't be
 3 done.

4 MS. POLK: Your Honor, the issue is not how
 5 sweat lodges are run or should be run. That's not
 6 the issue. The issue is the differences. There is
 7 no particular standard out there for running a
 8 sweat lodge that the state is trying to suggest.

9 What we are bringing out through
 10 testimony, though, is the common denominator is
 11 with Mr. Ray people get sick. So regardless of how
 12 the sweat lodge is run, that's the common
 13 denominator. And that's what I'm bringing out
 14 through this witness.

15 And in 2007 it doesn't really matter the
 16 kiva or the coverings. The common denominator is
 17 if it's Mr. Ray, people are getting sick. The
 18 difference, then, are important on this issue of
 19 causation. Because that's the explanation for why
 20 people are getting sick, and that's the issue of
 21 causation.

22 THE COURT: When you phrase it in the terms of
 23 the common denominator being Mr. Ray, it makes it
 24 sound like propensity. It has that.

25 MS. POLK: Your Honor, it's not propensity.

1 It's causation. The defense has suggested that
 2 there is something else out there -- the tarps or
 3 the water or the wood. This is something else out
 4 there.

5 And this is relevant to show that it
 6 doesn't really matter those conditions. People are
 7 not getting sick if it's not Mr. Ray's sweat lodge.
 8 It's not propensity. It's causation.

9 THE COURT: There is the other question, too,
 10 about these difference in conditions. Are you
 11 talking about a difference in kind or some
 12 continuum or spectrum? There are those too. There
 13 may well need to be limiting instructions. But
 14 talking about mechanical type differences without
 15 an implication that there is some standard or there
 16 is some kind of expertise here. Again, it has to
 17 be observational. And there may well be a limiting
 18 instruction. But it's going to be permitted.

19 On the other thing, Mr. Li, you just have
 20 to make your objections.

21 MR. LI: Your Honor, you've put us in an
 22 awkward position. We have made a very strong
 23 objection. And we are contemplating all of our
 24 various legal options. So we understand the
 25 Court's ruling.

1 The problem is the Court -- it makes
2 it -- you're putting us in a position, then, to
3 object to something you're going to allow in.

4 THE COURT: If you want an understanding that
5 your objections are on these grounds, I will not
6 make you repeat that.

7 MR. LI: Thank you.

8 THE COURT: If you just want to note you
9 object to the question, there was talk -- well,
10 causation testimony that was anticipated possibly
11 depending on foundation. You have questions
12 regarding that and you've done fairly extensive
13 cross-examination, I think 10 minutes or more on.

14 MR. LI: I understand. And the point is to
15 demonstrate there lacks foundation here for any
16 valid comparison. And our position is that this
17 entire line of questioning is inappropriate, as we
18 discussed this morning.

19 And I'm not waiving any objections that
20 we made this morning because those objections posed
21 address all of the issues that the state's getting
22 into right now.

23 THE COURT: I wouldn't anticipate there would
24 be many questions along this line. But for what
25 you've said now, if you want to make the objections

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1 based on what you registered here on this bench
2 conference, I'll just acknowledge that. And you
3 need to object.

4 MR. LI: Thank you, Your Honor.

5 THE COURT: Ms. Polk, anything further on this
6 point?

7 MS. POLK: I believe I heard the Court say he
8 needs to object --

9 THE COURT: I'm saying he has to object. What
10 I'm saying, I don't need a full elaboration of the
11 reason each time as long as it's understood what
12 was said in this bench conference.

13 MS. POLK: I understand. All right.

14 THE COURT: But what you said before and you
15 registered --

16 MR. LI: I just want to make sure that we
17 don't waive any objections on any sort of appellate
18 basis or anything like that. I understand what the
19 Court's ruling is.

20 May I make an objection just initially
21 and have it standing for all of the various
22 questions?

23 THE COURT: I don't know what the questions
24 are going to be. So no. If you're objecting on
25 the grounds of the specific objection now, what you

1 stated in this bench conference, that's fine.

2 You're saying you've stated other things. That's
3 going to be a general matter of record and whether
4 this court's made a mistake about how this 404(b)
5 or intrinsic evidence, all that came out. So
6 that's on the record.

7 But for now what's understood is your
8 objections are what you've stated in this bench
9 conference. If you say that, that's going to be
10 understood.

11 Ms. Polk, agreed?

12 MS. POLK: Yes.

13 MR. LI: Thank you.

14 (End of sidebar conference.)

15 THE COURT: You may continue when you're
16 ready, Ms. Polk.

17 Q. BY MS. POLK: Mr. Mercer, I want to ask
18 you specifically about the sweat lodge ceremonies
19 that you had a role in in the year 2007. Are you
20 able to recall -- I want to ask you about sweat
21 lodge ceremonies not conducted by Mr. Ray.

22 A. Okay.

23 Q. Do you recall for -- the first one you
24 did was for Mr. Ray?

25 A. Yes. That's correct.

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1 Q. Do you recall how many rounds that was?

2 A. I -- it goes about eight rounds.

3 Q. And then the -- did you do a second
4 ceremony in 2007?

5 A. Not for James Ray. But yes.

6 Q. For somebody else?

7 A. Uh-huh.

8 Q. And for that second ceremony, do you
9 recall how long the rounds were?

10 A. Not how long. The whole thing lasted
11 about an hour, hour and a half.

12 Q. And for Mr. Ray's in 2007, do you recall
13 how long the whole thing lasted?

14 A. It was over two hours.

15 Q. With respect to the ceremony in 2007 that
16 you did for someone other than Mr. Ray, do you
17 recall how long the door was open between rounds?

18 MR. LI: Objection, Your Honor.

19 THE COURT: Sustained.

20 Counsel, you know -- there is a
21 foundation issue. On foundation, sustained.

22 Q. BY MS. POLK: For the second ceremony
23 that you did in 2007, not for Mr. Ray, do you
24 know -- this is yes or no -- do you know how many
25 rounds were conducted?

1 MR. LI: Objection. Relevance.
 2 THE COURT: Overruled.
 3 THE WITNESS: Yes.
 4 Q. BY MS. POLK: Tell the jury how many.
 5 A. **Four.**
 6 Q. And with respect to that ceremony, do you
 7 recall how many rocks were used?
 8 MR. LI: Objection, Your Honor.
 9 THE COURT: Overruled.
 10 THE WITNESS: Answer that no.
 11 THE COURT: You may answer.
 12 Q. BY MS. POLK: Your answer is no?
 13 A. **No.**
 14 Q. Do you recall approximately how many
 15 rocks were used in that ceremony?
 16 MR. LI: Objection. Asked and answered.
 17 THE COURT: That's a yes or no. You may
 18 answer that.
 19 THE WITNESS: No.
 20 Q. BY MS. POLK: Do you recall, with respect
 21 to that ceremony in 2007, what the facilitator did
 22 with respect to the participants between the
 23 rounds?
 24 MR. LI: Objection. Relevance. On all of the
 25 thing at sidebar, Your Honor.

1 THE COURT: Sustained.
 2 Q. BY MS. POLK: Are you familiar with the
 3 role of a facilitator, the person -- the pourer
 4 inside a sweat lodge?
 5 MR. LI: Objection, Your Honor.
 6 MS. POLK: It's a yes or no.
 7 THE COURT: It is a yes or no.
 8 You may answer that if you can.
 9 THE WITNESS: No.
 10 Q. BY MS. POLK: With respect to the sweat
 11 lodge ceremonies that you had a role on the outside
 12 for 2008, not Mr. Ray's, but the others, do you
 13 recall, first of all, approximately how many you
 14 had a role in?
 15 A. **In 2008 there was probably around four or**
 16 **five.**
 17 Q. And you told us earlier the facilitators
 18 were people like Healing Wolf, Singing Bear,
 19 Dancing Butterfly?
 20 A. **Yes.**
 21 Q. With respect to those ceremonies, let's
 22 talk about a Healing Wolf ceremony. Do you recall
 23 how long that ceremony lasted?
 24 A. **Approximately an hour.**
 25 MR. LI: Objection, Your Honor.

1 THE COURT: Overruled. You may answer that.
 2 THE WITNESS: About an hour.
 3 Q. BY MS. POLK: And for the ceremony
 4 conducted by Singing Bear, do you recall how long
 5 the ceremony lasted?
 6 MR. LI: Same objection.
 7 THE COURT: Overruled.
 8 THE WITNESS: About an hour.
 9 Q. BY MS. POLK: And for the ceremony with
 10 Dancing Butterfly, do you recall how long that
 11 lasted?
 12 A. **That's about an hour, maybe a little**
 13 **longer.**
 14 Q. Have you observed, Mr. Mercer, whether or
 15 not there is a difference in the length of the
 16 ceremony conducted by Mr. Ray compared to the
 17 NonMr. Ray sweat lodges?
 18 MR. LI: Objection, Your Honor.
 19 THE COURT: Sustained.
 20 Q. BY MS. POLK: Have you ever conducted --
 21 have you ever assisted a sweat lodge ceremony or
 22 person other than Mr. Ray that went more than four
 23 rounds?
 24 A. **No.**
 25 Q. Let's move on to Sunday following the

1 October 8th ceremony conducted by Mr. Ray. Were
 2 you still on the Angel Valley property then?
 3 A. **How many days was that afterwards?**
 4 Q. The Mr. Ray's sweat lodge was on
 5 Thursday, October 8th. Let me rephrase the
 6 question.
 7 Did you participate in a burning ceremony
 8 a few days after Mr. Ray's sweat lodge?
 9 A. **Yes, I did.**
 10 Q. Are you able to recall today what day
 11 that ceremony was?
 12 A. **No.**
 13 Q. I'm going to put up on the overhead
 14 Exhibit 231. Do recognize that?
 15 A. **That's the kiva.**
 16 Q. Do you recognize this to be the part of
 17 the ceremony that you conducted -- I'm sorry --
 18 that you participated in?
 19 A. **Right at that picture it's hard to tell**
 20 **what was going on there.**
 21 Q. Let me bring the picture up to you. Just
 22 take a look at it and see if it helps you remember.
 23 A. **What I do know is that this was that day,**
 24 **because Michael Hamilton was down there. And I**
 25 **remember what he was dressed in. And they were**

1 over on this side talking about where the two
2 people we pulled out were.

3 Q. Do you recognize the group of people over
4 here?

5 A. I don't -- no. I didn't have really any
6 contact with the people in this -- this year's
7 sweat lodge. So I don't really know the faces very
8 well.

9 Q. For the burning ceremony, how long did
10 that last?

11 A. It was a couple hours.

12 Q. Was Debbie there also?

13 A. Yes, she was.

14 Q. Do you recall how many people were there
15 for that?

16 A. Thirty or 40. There was quite a few
17 people around the sweat lodge.

18 Q. I'm going to put this back up on the
19 overhead.

20 Did you have a role in taking down the
21 kiva?

22 A. Yes, I did. I assisted the rest of the
23 people when we took it apart.

24 Q. Tell the jury how you took it apart.

25 A. We had a knife. And there was some

1 people just untying the strings. And they'd untie
2 them and then pull the sticks out of the ground.
3 And we made a pile with it.

4 Q. I'm going to put up on the overhead
5 Exhibit 232. Did you gather around the kiva?

6 A. Yes, we did.

7 Q. What were you doing in this photograph,
8 if you recall?

9 A. We were having a ceremony to honor the
10 people who were in the sweat lodge and especially
11 the people who died.

12 Q. Was there a leader of that ceremony?

13 A. I guess if there were a leader, it would
14 be Michael Hamilton.

15 Q. Did you have some role or did you say
16 some prayers or anything?

17 A. Yes, I did. I had taken a bowl of corn
18 meal, and I gave everybody some corn meal. And I
19 said let's say a prayer to the corn meal and offer
20 it to the sweat lodge.

21 Q. What does the corn meal symbolize for
22 you?

23 A. It just symbolizes an offering, something
24 to offer. It's an energetic offering pretty much
25 that you offer energetically that what happened

1 there -- try to help any negative energies or any
2 of the souls that might be hanging around, to help
3 them move on.

4 Q. I'm going to put up on the overhead
5 Exhibit 233. Does this illustrate what you talked
6 about with the untying of the branches?

7 A. Yes, it is.

8 Q. I'm going to put up Exhibit 235. What do
9 you recall about this photograph?

10 A. That's where we piled the sticks and took
11 the remaining rocks and made a heart around it and
12 we burned it.

13 Q. And then Exhibit 236. Is that the
14 burning, then, of the willow branches?

15 A. Yes, it is.

16 Q. How long would you say the willow
17 branches were burning for?

18 A. Half hour. They burned up pretty quick.

19 Q. And then Exhibit 237. There is something
20 purple we can see in the fire. Do you recall what
21 that was?

22 A. Those are called "prayer ties."

23 Q. Where did they come from?

24 A. They were probably on the inside of the
25 sweat lodge attached to it, or they could have been

1 around the door.

2 Q. And did your proximity to this fire
3 during the burning ceremony make you sick in any
4 way?

5 A. Not at all.

6 Q. You told the jury earlier that for
7 Mr. Ray's 2009 sweat lodge ceremony that a hundred
8 rocks were ordered. Do you recall that?

9 A. That's correct.

10 Q. How many were ordered for Mr. Ray's 2008
11 sweat lodge ceremony?

12 A. Approximately 80.

13 Q. And do you recall how many were ordered
14 for Mr. Ray's 2007 ceremony?

15 A. Approximately 80 again.

16 Q. And do you recall how many rocks were
17 ordered for the other sweat lodges that you did in
18 2007 that were not Mr. Ray's events?

19 MR. LI: Objection, Your Honor.

20 THE COURT: That's a yes or no, if you can
21 answer it, Mr. Mercer.

22 THE WITNESS: Yes.

23 Q. BY MS. POLK: Will you tell the jury how
24 many.

25 MR. LI: Same objection.

1 THE COURT: It's -- and the grounds, Mr. Li?

2 MR. LI: Those discussed at sidebar, Your

3 Honor.

4 THE COURT: Overruled.

5 THE WITNESS: I know that Singing Bear would
6 only have 24. And Kerrie. She had approximately
7 30. And I know that Healing Wolf would be in the
8 24, 25 range.

9 Q. BY MS. POLK: And who was Kerrie? Kerrie
10 Dancing Butterfly?

11 A. That's correct.

12 Q. Thank you, Mr. Mercer.

13 Thank you, Your Honor.

14 THE COURT: Thank you, Counsel.

15 We're going to go ahead and take the
16 recess.

17 MR. LI: Your Honor, if I can use 13 minutes?

18 THE COURT: The -- I just want to make sure
19 we -- we have got one question about a juror's had
20 some issues -- you know.

21 MR. LI: Fair enough.

22 THE COURT: Health things. I'm concerned
23 about that. I think we should go ahead and recess,
24 then, for evening. Let everybody get some rest.

25 Please, ladies and gentlemen, remember

1 all aspects of the admonition. That continues to
2 apply.

3 And, Mr. Mercer, recall that rule of
4 exclusion I've discussed with you. You must follow
5 that completely.

6 You understand?

7 We'll be in recess.

8 Well, I'm going to ask the parties to
9 remain.

10 I'll stand as the jury exits.

11 You are excused too, sir.

12 (Proceedings continued outside presence
13 of jury.)

14 THE COURT: The record will show the presence
15 of the defendant and the attorneys. The witness is
16 now leaving, and the jury has exited as well.

17 And Mr. Li, two things. I do want to use
18 all the time possible. But I've been watching the
19 particular juror and --

20 MR. LI: I apologize for my eagerness.

21 THE COURT: And the other thing was Mr. Kelly
22 said he wanted to raise some legal issues. And
23 we'll do that.

24 MR. KELLY: Thank you, Judge. And I believe
25 it will be brief.

1 But, essentially, the inquiry is this:

2 We listened to your ruling this morning regarding
3 the admissibility of the prior sweat lodges. I'm
4 not going to call them "prior acts," but the prior
5 sweat lodges.

6 And I have a distinct memory that your
7 instruction to Ms. Polk was that there could be
8 limited inquiry into those prior events in order to
9 establish causation. Because, obviously, still,
10 the issue is what happened in '09. And this is a
11 manslaughter case.

12 Then we heard the direct examination of
13 Mr. Mercer, which, Judge, I believe, went beyond
14 limited inquiry into these prior sweat lodge
15 incidents.

16 But more importantly, Judge, I think the
17 question that we have is this: There have been
18 some 15 witnesses disclosed by the state who have
19 been proffered as witnesses who are going to
20 testify about the prior sweat lodge events
21 beginning in '05 and going through '09.

22 And what we're asking for at this point
23 in time, Judge, is a clarification in that regard
24 from the Court. We're not exactly sure where we
25 stand. I believe that's articulated by Mr. Li at

1 the sidebar. And we're asking for a clarification.

2 I recall Friday you instructing Ms. Polk
3 that she could not make comparisons between other
4 sweat lodge in terms of duration and et cetera. If
5 I'm mistaken in this regard, I apologize. But I
6 recall that at a sidebar. And now we just heard
7 some comparison. And we simply want to know from
8 the Court the scope of the ruling, if possible,
9 Judge.

10 THE COURT: With Fawn Foster, the way the
11 questioning was presented was just coming out as
12 showing her to be some type of expert or something
13 or being able to make these comparisons. She also
14 had difficulty in saying when the sweat lodge
15 actually occurred. There was just a number of
16 issues that came up really with her first. And the
17 objections were made. They were sustained at the
18 time.

19 But before I address the other part,
20 Ms. Polk, I want to hear what you have to say about
21 this, the points that Mr. Kelly has raised.

22 MS. POLK: Well, Your Honor, the discussion
23 that we had this morning outside the presence of
24 the jury clearly included that whole pattern what
25 happens when it's a Mr. Ray run sweat lodge, what

1 happens when it is not.

2 I agree with the Court. With respect to
3 Fawn Foster, the state had never intended to elicit
4 comparisons. The area we were talking about with
5 Fawn Foster was her role, her participation, in a
6 sweat lodge not run by Mr. Ray and then asking her
7 to describe that.

8 The Court indicated at the time that when
9 the proper foundation had been laid, that you would
10 consider allowing us to ask those questions.

11 We, then, did not go there and indicated
12 that when that proper foundation had been laid,
13 then it was our intention to call her back to talk
14 specifically about a ceremony she participated on
15 at Angel Valley using that same kiva, the same
16 coverings, and to describe what that ceremony was
17 like. And so, yes, that was a comparison.

18 The Court indicated at the time it would
19 be admissible once the proper foundation was laid
20 that it was the same kiva and the same coverings.
21 The foundation had not been laid at that point.

22 It has now been laid or it will be laid,
23 continue to be laid through the Hamiltons, and then
24 we intend to be bringing Ms. Foster back.

25 THE COURT: Mr. Kelly, that was the primary

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1 concern there is just the foundation, and even when
2 it occurred what the materials were. Ms. Foster
3 kept indicating they were kept in the pump room but
4 not knowing various things about them. Then Mr. Li
5 in his voir dire actually did some fairly extensive
6 cross-examination about potential foundational
7 issues.

8 But anyway, go ahead.

9 MR. KELLY: Judge, I'm not arguing the point.
10 I believe Mr. Li argued very well this morning in
11 regards to our objections.

12 THE COURT: Let me get to part two, then.

13 The other part --

14 And, Ms. Polk, I don't know that you
15 addressed this. But it had to do with 15 disclosed
16 witnesses and what's going to happen now. And I've
17 said this testimony really should be relatively
18 brief. It goes to the issue of physical causation,
19 and it just doesn't need to be and won't be
20 cumulative. That's my thought.

21 Ms. Polk, you didn't address that. I
22 don't know if you had anything else to say on that.
23 But I want to hear. That's actually what I wanted
24 you to address.

25 Mr. Hughes, you're going to do that?

1 MR. HUGHES: Yes, Your Honor. With the
2 Court's permission, I'll address that topic.

3 We do expect the other witnesses who were
4 not participants in '09 to be relatively brief
5 witnesses. We've been moving really slowly through
6 the '09 witnesses to this point.

7 Witnesses who were at prior years' sweat
8 lodges, I expect we'll move through them much more
9 quickly. And I agree that there is a point where
10 evidence does become cumulative. We don't intend
11 to cross that point.

12 But the -- to compare the witnesses that
13 we've had so far to the witnesses who will talk
14 about prior events, it's sort of like comparing
15 apples to oranges. I do believe we'll move through
16 them much more quickly than we've been moving
17 through the witnesses at this point.

18 THE COURT: Okay. I'm concerned about
19 cumulative because it then does carry the potential
20 of it's not just about causation and that really
21 heat is what's going on, which is what you're
22 maintaining, as opposed to something else, and
23 here's the circumstantial evidence of that.

24 It'll get to the point of a number of
25 people getting up there and perhaps going well

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1 beyond strict observations, which the 404(b)
2 hearing revealed will not have anything that
3 suggests in itself that life-threatening conditions
4 were involved.

5 MR. KELLY: Judge, again, I heard Ms. Polk at
6 the sidebar. I just heard her articulate a pattern
7 to me, and then your response, Judge. And to me,
8 it implies that the 404(b) floodgate is open, in
9 other words. And then Mr. Hughes said, yes, we're
10 going to call all 15.

11 Now, we're entitled to notice to prepare
12 our defense. We're eight weeks into trial, and
13 Mr. Li argued this morning. We don't believe it's
14 proper. And all we're asking is some definitive
15 response from the Court as to what is going to be
16 admitted so we can prepare our defense and make
17 legal decisions in this case.

18 And I think I heard Mr. Hughes say that
19 the state intends on presenting each and every one
20 of the 15 witnesses disclosed as 404(b) prior act
21 evidence witnesses, and now under the myth of
22 causation, they're going to be allowed into this
23 trial.

24 And if that's true, Judge, we're entitled
25 to notice so we can prepare properly. And we're

1 also entitled to amend our witness list so that we
2 can present evidence contrary to those witness
3 representations as to the prior incidents. That's
4 all we're trying to clarify, Judge.

5 And I'm still unsure as to what the state
6 intends. I mean, 15 brief witnesses versus 15
7 lengthy witnesses. That still requires us to
8 prepare.

9 We're asking for notice, and then we may
10 ask for the opportunity to amend our trial witness
11 list, which is going to lengthen this trial.

12 The jury can't get just one side of this.
13 We've been through this in November.

14 I think of the famous two photographs. I
15 don't recall their numbers. But one perspective,
16 the witness said, oh, look what distress they're
17 in. And we showed the other perspective. They had
18 the thumbs up and a big smile on their face. We
19 need to combat or show the other side of the story
20 if the state's going to present 15 witnesses from
21 these prior incidents.

22 THE COURT: Mr. Hughes.

23 MR. HUGHES: Your Honor, if I can address a
24 couple points. First of all, I realize it's 4:30.
25 And I'm not going to say -- go too far into the

1 state takes exception to the "myth of causation."

2 Causation is a very real issue that's
3 arisen in this case, and it's appropriate for the
4 state to address it.

5 With respect to 15, the Court today made
6 clear it's decision that we're to go into that area
7 but only briefly. So we do have to make decisions
8 as to which of the 15 we'll be calling.

9 It does raise the issue, however, if we
10 only call 5 or 6 of those 15, will the defense then
11 make a comment to the jury in its closing argument,
12 you only heard from 5 or 6 witnesses. You didn't
13 hear from all the others.

14 And so, I don't want -- if the defense is
15 raising these spectre of cumulative at this point,
16 I don't want that to be raised as an argument later
17 on.

18 But as to which of these 15 or so
19 witnesses we intend to call, we will make a
20 decision, as I told the Court a few minutes ago.
21 It's not our intention to spend a long time with
22 every one of these witnesses. We intend to move
23 much more quickly with the witnesses. And at this
24 point we may not all 15. We just need to make that
25 determination.

1 THE COURT: Well, I'm not going to permit
2 cumulative testimony on this.

3 MR. KELLY: Judge, I have to correct one thing
4 for the record.

5 Causation is not a myth. It's a
6 necessary element that the state has to prove
7 beyond a reasonable doubt.

8 The myth is that at one time during a
9 404(b) hearing, the causation was the propensity of
10 Mr. Ray and the fact that he stood through these
11 various prior events and did nothing.

12 When that was rejected by the Court, the
13 causation argument became Rick Ross and Steven Pace
14 and the EL-GAT (phonetic) theory. And now eight
15 weeks into trial, the myth of the causation in the
16 state's argument is the back door to the 404(b).
17 That's what I was referring to in regards to a
18 myth.

19 And again, Judge, you said this morning
20 limited inquiry. And 15 witnesses, I would submit,
21 is not limited inquiry. It requires preparation of
22 15 witnesses. And it requires us, contrary to what
23 Mr. Hughes says, to argue to this jury that the
24 handpicked 15 witnesses out of four years of sweat
25 lodge ceremonies involving several hundreds of

1 people is not an accurate, factual representation
2 of what happened. That's the position.

3 And I think you said it best in November.
4 We're not going to back and go through a series of
5 minitrials beginning in '05. And yet that's the
6 position that we're in.

7 And all we're asking for this afternoon,
8 in order to properly assess our alternatives -- and
9 we talked about this this morning -- is clear
10 direction from the Court as to what's going to be
11 allowed.

12 And I think the response from the state
13 at one time is that 15 are necessary. And after
14 listening to my argument, all of a sudden they'll
15 pare it down and give us notice at a later date.
16 That's inadequate, Judge.

17 THE COURT: There is not going to be
18 cumulative testimony. There has been testimony to
19 the effect of what was contemplated. It's not
20 going to be cumulative. And I suppose, Mr. Kelly,
21 it depends on what's the defense does. Even as a
22 result of what's been produced here today, that
23 might dictate other witnesses.

24 But that's what I'm saying. It's not
25 going to be cumulative, and it's not going to be

1 testimony that really is suggesting some kind of
2 propensity. It's not going to be that. As I've
3 indicated here in open court and also at these
4 bench conferences, there may well need to be a
5 limiting instruction.

6 Mr. Hughes, it's just not going to be
7 cumulative testimony. That's all I can say.

8 MR. HUGHES: Thank you, Your Honor. The state
9 understands that.

10 MR. KELLY: Judge, we're entitled to a list of
11 names of the people that they intend to present as
12 to those prior years. We're entitled to know which
13 of the 2009 participants that were involved in
14 earlier years will testify in that regard.

15 THE COURT: You're saying they haven't been
16 disclosed?

17 MR. KELLY: What I'm saying, Judge, is
18 everything has been disclosed. And now we're
19 hearing a comment from the state it will not be
20 cumulative.

21 And what I'm asking are more questions
22 than arguments. I realize there are arguments
23 interwoven in it. So what does that mean? Which
24 ones are you going to call? Which ones are you
25 not? What type of evidence from the 2009

1 participants who may have been involved in earlier
2 sweat lodge events are going to discuss the prior
3 sweat lodges? We're entitled to that notice.

4 MR. HUGHES: Your Honor, the state does
5 believe it has met its discovery obligations.
6 We've provided the defense with the notice of
7 witnesses that we had intended to call. That list
8 of witnesses is significantly shorter than all the
9 people who are involved in this case. It's not an
10 anything and everything in the list.

11 As I indicated, we amongst the
12 prosecution team will be talking to see if we can
13 pare the list down further. But as of now the
14 state has disclosed and the defense does have the
15 state's list of witnesses for the different years.

16 Remember, we are talking about four
17 years, Mr. Kelly. And I don't know if the 15
18 number, quite honestly, is accurate. Although it's
19 certainly in the ballpark. That will be
20 approximately four a year. And we may be able to
21 carve that down further.

22 Individual witnesses remember different
23 things about particular years. And that needs to
24 be factored in as well when you're determining at
25 what point does a witness's testimony become

1 cumulative from what they've heard from other
2 witnesses.

3 But the state understands the Court's
4 ruling. The cumulative rule applies in every case
5 with every bit of evidence, and we're aware that it
6 applies in this case as well.

7 We didn't call every participant
8 from 2009. We have not disclosed as trial
9 witnesses every participant from '09 or from '08 or
10 from the other years. We pared that list down, and
11 we may continue to pare the list down.

12 But for Mr. Kelly to ask at 4:30 who do
13 we intend to call at this point, I think it's
14 unfair. The state needs time to decide. And the
15 Court needs to hear from the testimony of those
16 particular witnesses if Mr. Kelly believes that
17 they're cumulative for the Court to make a ruling.

18 It's premature at this point, before
19 we've heard from those other witnesses, to
20 determine at what point do they become cumulative.

21 Clearly witnesses remember different
22 aspects of the same year that they were in
23 attendance at. And as long as you're not calling
24 three or four witnesses to say the same thing, it's
25 not going to reach the point of being cumulative.

1 MR. KELLY: Judge, again, we're assessing our
2 legal options. And we're really unclear as to
3 where we stand in regards to the Court's ruling.

4 We clearly understand the nature of the
5 cumulative testimony or evidence and know when to
6 object in that regard. But that's not the issue.

7 What has happened today, as articulated
8 by Mr. Li this morning, is a gate has opened that
9 we did not anticipate. We relied on your pretrial
10 court order. We relied on your rulings up to that
11 point. We understand your rationale now.

12 But we would like something clear,
13 articulated, so that we can assess whether or not
14 we need to request a stay of special action to the
15 Arizona Appellate Court. And we don't have that at
16 this point in time. We're still not sure.

17 Even in Mr. Hughes' response, he says, we
18 have notice of the 15, and we may call them. That
19 still is inadequate. Which ones is he going to
20 call?

21 THE COURT: If you recall Jennifer Haley's
22 testimony, and I think that was actually made
23 without objection in court. There was a brief
24 mention -- well, brief testimony regarding an
25 incident. There was a statement about an opinion,

1 going to the hospital, that came out or maybe
2 should have gone to the hospital.

3 Then there was a photograph offered that
4 had been listed in the morning and then delisted.
5 And then we had that whole, full discussion about
6 impeaching and whether that photographed had to be
7 disclosed, and I sustained the objection there.

8 So this was not the first time that
9 testimony of lay observation of an effect of the
10 sweat lodge has been introduced in the trial.

11 It was Jennifer Haley, wasn't it?

12 MR. LI: It was, Your Honor. But it was
13 objected to, just for the record.

14 THE COURT: Well, there were objections there.
15 I know there were. And I know that I'm just trying
16 to think with regard to that specific aspect
17 whether or not there was an objection. But -- so
18 this isn't the first time it's come in.

19 I've indicated there is no reason to
20 dwell on this type of testimony. It's brought up
21 with regard to physical causation. That's, I
22 think, how Ms. Polk confirmed this morning that
23 that's the reason it's being offered, not the legal
24 aspect of causation that you've also talked about
25 as well. And the limiting instruction is a

1 distinct possibility.

2 When you look at the total time the
3 testimony has taken for Ms. Haley in this area and
4 then for Mr. Mercer, it was not very much.

5 And in terms of numbers, I don't see the
6 need for a multitude of witnesses on this,
7 Mr. Hughes. That's all I'm saying. The point can
8 be made with focused, clear observations that
9 relate to just observations and not opinion.

10 Mr. LI.

11 MR. LI: Sorry, Your Honor. The issue is
12 this: I beg to differ when the Court says it's
13 only relating to physical causation. Because the
14 state is not talking about physical causation.
15 They're talking about --

16 THE COURT: Mr. LI, I don't want to interrupt
17 you, but you've made that argument so many times
18 today and elaborately. And I've talked about if
19 there needs to be some kind of limiting
20 instruction, that can happen.

21 MR. LI: I appreciate that, Your Honor. I
22 guess what we're really looking for is a definitive
23 ruling on this issue so that we can pose -- decide
24 whether a special action is appropriate and decide
25 what issue would be presented on special action.

1 Because without that clarity, we are in
2 this situation where we are trying to determine the
3 road rules at sidebar. And it makes things
4 difficult, as the Court saw this afternoon. It
5 just makes things difficult because we don't know
6 what the rules of the road are going to be.

7 And so the question here is simply,
8 setting aside the cumulative issue, is it the
9 Court's ruling that -- you know -- prior witnesses
10 relating to prior sweat lodges can come in and
11 testify about -- and let's assume for a second
12 those same witnesses did not participate in
13 the 2009 case, so they have literally no basis of
14 comparison to anything. All they're going to do is
15 describe what happened in 2005, let's say, for
16 instance.

17 Is it the Court's ruling that those
18 witnesses who would only, say, describe 2005, that
19 that would be admissible for the various reasons
20 for causation purposes? Is that --

21 THE COURT: What's admissible are limited
22 observation as to effects which the experts have
23 tied into heat perhaps, or arguably. That's what
24 they can testify to. And with regard to have
25 comparisons of number of rocks and others, I can't

1 imagine anybody getting into that aspect of it.
2 But physical causation and the testimony will not
3 be cumulative. That's the guidance I can provide
4 you.

5 MR. LI: Thank you. Just so we're clear, if
6 there is a hypothetical witness who only testifies
7 relating to 2005, what he or she observed in 2005,
8 did not participate in 2009, that witness would be
9 admissible for the various purposes that the state
10 claims are appropriate?

11 THE COURT: Well, at this time, that's all I'm
12 going to say. All the guidance I can give is there
13 will not be cumulative testimony in this area.

14 That's all I can say, Mr. LI.

15 Thank you. We're in recess.

16 (The proceedings concluded.)
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1 STATE OF ARIZONA)
2 COUNTY OF YAVAPAI) ss: REPORTER'S CERTIFICATE

3

4 I, Mina G Hunt, do hereby certify that I
5 am a Certified Reporter within the State of Arizona
6 and Certified Shorthand Reporter in California

7 I further certify that these proceedings
8 were taken in shorthand by me at the time and place
9 herein set forth, and were thereafter reduced to
10 typewritten form, and that the foregoing
11 constitutes a true and correct transcript

12 I further certify that I am not related
13 to, employed by, nor of counsel for any of the
14 parties or attorneys herein, nor otherwise
15 interested in the result of the within action

16 In witness whereof, I have affixed my
17 signature this 17th day of April, 2011.

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MINA G HUNT, AZ CR No. 50619
CA CSR No 8335

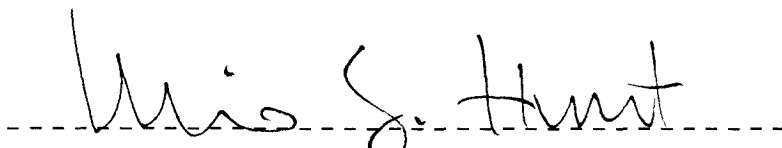
1 STATE OF ARIZONA)
2 COUNTY OF YAVAPAI) ss: REPORTER'S CERTIFICATE

3
4 I, Mina G. Hunt, do hereby certify that I
5 am a Certified Reporter within the State of Arizona
6 and Certified Shorthand Reporter in California.

7 I further certify that these proceedings
8 were taken in shorthand by me at the time and place
9 herein set forth, and were thereafter reduced to
10 typewritten form, and that the foregoing
11 constitutes a true and correct transcript.

12 I further certify that I am not related
13 to, employed by, nor of counsel for any of the
14 parties or attorneys herein, nor otherwise
15 interested in the result of the within action.

16 In witness whereof, I have affixed my
17 signature this 17th day of April, 2011.

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25 CA CSR No. 8335